MANUAL OF THE LAW

OF

LANDLORD AND TENANT

FOR USE IN THE

PROVINCE OF ONTARIO.

BY

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PREFACE.

THAT persons outside the legal profession often expect to know law by some patent method, which persons inside of that profession have never yet discovered, is very true. That the expectation is not realized is also very true. Therefore, to tell any person that he may expect to become an expert in the law of Landlord and Tenant by reading any synopsis would be to mislead. But there are points of law which every man should learn something about, so that he may know that there are difficulties to be guarded against. This manual is drawn up with the intention of imparting information of that kind. At the same time it is hoped that the book may be of use to the legal profession as a means of ready reference.

I have added to each chapter a selection of notes of cases from our own courts. These

cases have been carefully chosen, and the notes are as full as space would allow. The cases are included up to the end of 26 Ontario Reports and 22 Ontario Appeal Reports. Later than those volumes they are taken from the Canadian Law Times.

The statute law referred to includes legislation of last session (1896).

The precedents are taken from sources too numerous to specify.

For the whole book Holdsworth's Landlord and Tenant, published over forty years ago by Routledge, has been a model. But that work however good in its time, is long out of date, and contains English law never in force here. Still, I feel bound to acknowledge my obligations to that book. It has been of great assistance.

R. E. K.

34 MURRAY STREET,
TORONTO, November, 1896.

ABBREVIATIONS.

R. S. O.—Revised Statutes of Ontario [1887].

U. C. R.—Upper Canada Queen's Bench Reports.

C. P.—Upper Canada Common Pleas Reports.

Chy.—Upper Canada Chancery Reports.

O. R.—Ontario Reports.

A. R.—Ontario Appeal Reports.

S. C. R.—Canada Supreme Court Reports.

THE STATUTES

Relating to Landlord and Tenant, passed before 1792, still in force in Ontario, are as follows :—

A.D.

1266—51 Hen. III. st. 4 (Distress).
The owner may feed his cattle impounded. No distress shall be taken of plough cattle or sheep.

1267—52 Hen. III. cc. 1-21 (Statute of Marlebridge).
Penalty for Wrongful Distress.

1275—3 Edw. I. cc. 16, 17 (Westminster the First).
Distress not to be driven out of County.

1285—13 Edw. I. cc. 2, 3, 37 (Westminster the Second).
Replevin Bonds.
No distress but by bailiffs sworn and known.

1300—28 Edw. I. c. 12 (see also Hen. III. st. 4, above).
Beasts of the plough not to be distrained on for the King's debt.

1540—32 Hen. VIII. c. 34.
Grantees of Reversions to take benefit of conditions to be performed by lessees.

1540—32 Hen. VIII. c. 37.
Recovery of Rent by Executor.

1554—1 & 2 Ph. & Mary, c. 12.
Impounding of Distress.

A.D.

1689—2 Wm. & Mary, Sess. 1, c. 5.
Power of Landlord to sell distress after appraisement if not replevied in five days. Distress on sheaves or cocks of corn, or hay loose, or in straw. Treble damages for pound breach. Double damages for unlawful distress and sale.

1705—4 Anne, c. 16.
Grants of reversion valid without attornment of tenant.

1709—8 Anne, c. 14.
No goods to be taken in execution unless party before removal of goods pay the landlord the rent due up to one year's arrears. Action for rent against tenant for lives. Distress within six months after lease determined.

1731—4 Geo. II. c. 28.
Double value on holding over after Landlord's Notice to Quit—Recovery of Chief Rents—Renewal without surrender of Sub-leases.

1738—11 Geo. II. c. 19.
Secs. 1-7. Power to Landlord to follow goods removed to avoid distress.
9. Distress on cattle, on common, and upon corn, grass, hops, etc.
10. Impounding distress on premises of tenant.
11. Attornments to strangers void.
Secs. 12, 13, relate to notice by tenant of writ. (See Chapter XVII.)
14. Use and occupation.

A.D.

1738—11 Geo. II. c. 19.

15. Apportionment where tenant for life dies before rent is payable (superseded by apportionment sections of Landlord and Tenant Act, Chapter VII).

16, 17. Recovery of deserted premises by landlord.

18. Double rent for holding over after tenant's own notice.

19. Distress not unlawful for irregularity.

ACTS RELATING TO LEASES PASSED PRIOR TO 1792.

1278—6 Edw. I. c. 5 (Statute of Gloucester).

Against whom an action of Waste is maintainable.

1529—21 Hen. VIII. c. 15.

Feigned recoveries abolished.

1540—32 Hen. VIII. c. 28.

Lessees to enjoy leases as against tenants in tail.

1541—33 Hen. VIII. c. 27.

Leases of hospitals, colleges, etc., good with consent of the majority.

ONTARIO LEGISLATION.

R. S. O. c. 143.—Law of Landlord and Tenant.

R. S. O. c. 144.—Overholding Tenants.

Statutes—1892, c. 31.
1894, c. 43.
1895, c. 26.
1896, c. 18, sched. (15), (47), c. 42.

CHAPTERS.

ANALYSIS.

This analysis is intended to serve also the purposes of an index.

XIV.—HOW A TENANCY, ETC.—(Continued.)

XV.—TENANT'S REMEDY FOR WRONGFUL OR IRREGULAR DISTRESS.

XVI.—THE RECOVERY OF TENEMENTS.

XVII. — SOME MISCELLANEOUS STATUTORY DIRECTIONS.

FORMS.

THE LAW OF

LANDLORD AND TENANT.

CHAPTER I.

WHO MAY BECOME LANDLORD OR TENANT.

Object of this book.

1. The object of the following pages is to furnish a short, simple and untechnical statement of the respective and reciprocal rights and liabilities of landlord and tenant. In dealing with any subject relating to any branch of law the use of technical terms is absolutely necessary to some extent. Where such terms occur in these pages they will be as far as possible explained.

2. The law relating to property and civil rights is assigned by the British North America Act to the Provincial Legislatures

as distinguished from the Dominion Parliament. The Dominion statutes, therefore, contain nothing relating to the special subject of landlord and tenant, and the statutory law bearing on that relation for the Province of Ontario is contained in the Ontario statutes, and in Imperial statutes in force in Ontario, as already mentioned in list thereof.

"Common Law" explained.

3. These statutes have modified or amended or altered what is known as the common law; this latter term means that body of law which has descended to the inhabitants of Ontario from England. By Act of the Parliament of Upper Canada, 1792, the law of England was declared to be the law of Upper Canada, and by succession is the law of Ontario. It is called common law, because it is common to all the inhabitants of Ontario, just as the book of Common Prayer is so called because it is the prayer book for all people to use in common if they choose. Commonwealth, commonalty, common right are analogous terms. It is necessary to understand that these two sources of law must be investigated in order to ascertain what the present law on any subject may be. This volume will, therefore, be a succinct statement of the common law as above explained relating to landlord and tenant as adjusted by statutes in force in the Province of Ontario.

"Landlord." "Tenant."

4. A landlord* is one who having an interest in land grants to another (called a tenant) a portion of such interest, either so limited in point of duration or so much burdened by obligations and agreements to be discharged or performed, or by payments of rent to be made by the tenant to the landlord, that the interest remaining to the latter in the land is of appreciable, if not of substantial, value. We would scarcely regard the owner of the fee simple as the "landlord" of another to whom he had leased the land for 999 years at a nominal rental. Such, however, would technically be the case; and important consequences might, under certain circumstances, result from the apparently merely nominal connection thus established between the parties. To trace these, however, is beyond the scope of the present work, which has to deal entirely with the practical and everyday questions arising out of such a relation as is above described.

Who may lease or rent.

5. Before entering into any explanation of the various descriptions of tenancy, it will

* "Tenant" shall mean and include an occupant, a subtenant, under-tenant, and his and their assigns and legal representatives.

"Landlord" shall mean and include the lessor, owner, the person giving or permitting the occupation of the premises in question and the person entitled to possession thereof, and his and their heirs and assigns and legal representatives: *Ontario Overholding Tenants Act*, R. S. O. c. 144, sec. 1.

be best to consider who may become landlord or tenant.

Every person, except those to whom I shall immediately call attention, may grant to another any interest not exceeding in duration that which he himself holds in any land. And even if a person grants a lease for a period not necessarily less than his own estate in land, it will be good, and cannot be set aside so long as his own estate endures. There are, indeed, some cases in which persons may lease or let land for a term longer than their own estate in it, but I will not specify them here, as they are not within the province of these pages.

Married women.

6. Now, as to who may lease. A married woman may now own land and make leases and receive rents, and also may become a tenant exactly as if she were unmarried. Her husband need not execute the conveyance nor the lease, and she may, if she is the bona fide tenant of the property, exclude her husband from her premises exactly as she could any stranger. If she makes no will of her estate leaving it away from her husband, he becomes entitled to a share in her property, whether real or personal, dependent on certain conditions.

7. With regard to land which has not been

made the subject of a marriage settlement, the husband may have at his election, if he has by the wife issue who may succeed to the property, a further estate for his own life in case he is the survivor, and a lease by him would bind his estate as far as it extended. Husband's right to lease wife's property.

8. Leases made by the guardian of an infant, if such guardian have been appointed by will, are valid until the heir comes of age, but they may then be confirmed or set aside by him. Infant's guardian.

Section 10 of the Landlord and Tenant Act (R. S. O. c. 143) is as follows:

"Where any person being under the age of twenty-one years, or a lunatic, or a person of unsound mind, shall be seised of the reversion of land subject to a lease, and such lease shall contain a covenant not to assign or sublet without leave, the guardian of such infant, or the committee of such lunatic, or person of unsound mind, may, with the approbation of the Judge of the Surrogate Court of the county in which the land is situate, consent to any assignment or transfer of such leasehold interest, in the same manner and with the like effect as if the consent were given by a lessor under no disability." Section 33 of the Judicature Act (Ontario Acts, 1896, page 66), empowers the High Court of Justice to make settlements of infants' estates on marriage, and chapter 20 (page 143, same volume), authorizes the making of leases of settled estates.

Executors and administrators.

9. Executors and administrators are entitled to any leasehold estates possessed by their testator, and may dispose of or sublet them as they please, unless he has bequeathed them to a particular person, and they have assented to the bequest; which they must do if he has left other property not specifically bequeathed sufficient for the payment of his debts. Under the Devolution of Estates Act executors are allowed a year or more to wind up an estate. When they have once assented to a bequest, the lease becomes vested in the person to whom it is left as a legacy, and, of course, they have no further right to deal with it.*

Assignees.

10. The rights of assignees in insolvency require special attention, and as they are specially dealt with by statute of Ontario we will come to them later on. (Chapter XI.)

Idiots.

11. Leases made by idiots or insane persons are binding unless steps are taken to set them aside; but they may be avoided on proof of the idiocy or insanity. A lease made during a lucid interval cannot be impeached on the grounds of previous or subsequent in-

* By R. S. O. c. 110, secs. 34 and 35, where an executor or administrator, who is liable as such on a lease or on a rent charge, assigns the lease, he may, after he has satisfied all liabilities under the lease and set aside any sum required by the lease to be expended on the property, safely distribute the estate.

sanity. The committee of a lunatic may make leases under the direction of the High Court of Justice for Ontario.

Infants.

12. If an infant makes a lease he can avoid it when he comes of age, but if he then by any act—such, for instance, as the receipt of rent—recognize it as subsisting, he will be thenceforth bound by it.

Repudiation by infants.

13. Infants may, within a reasonable time after coming of age, repudiate leases made by them during infancy. If, however, circumstances render it necessary for them to reside apart from their family, even during infancy they may be compelled to pay for the actual occupation of any houses or lodgings suitable to their condition in life.

Intoxicated persons.

14. The intoxication either of the lessor or lessee will be a good ground for setting aside a lease, if it appear that the party was so drunk that he did not know what he was doing when he executed it; or if while partially intoxicated fraud was practiced on him.

15. Subject to similar exceptions and qualifications as in the case of landlords, anyone may become a lessee or tenant.

Aliens.

16. I stated that the provincial statutes contained everything relating to the law of

landlord and tenant, but I have now to mention the subject of aliens. Under the British North America Act aliens and naturalization are assigned to Dominion jurisdiction, and therefore for laws relating to aliens we must consult the Dominion statutes. Under these statutes aliens can hold and dispose of all real and personal property exactly as if they were natural born subjects. There is no contradiction in calling attention to this branch of Dominion jurisdiction, because it is far wider than that of landlord and tenant, and covers all relations which may exist between aliens and natural-born subjects.

Assignee of an insolvent.

17. The assignee of an insolvent cannot take a lease of any part of the insolvent's or bankrupt's property for his own benefit, nor can a trustee of the property of the person for whom he is trustee. If he does, he is compellable to account to the creditors for any profits which he may derive from it, while any loss which it may entail must fall upon himself. A trustee must likewise account to the person for whom he is trustee.

Agent.

18. An agent can bind his principal by making a lease for him or by renting property on his account when the transaction is within the scope of his authority. When the lease is for a long term of years the party dealing with the agent should insist on the registra-

tion of the power of attorney under which the agent assumes to act. A principal may become bound by ratification. In fact, any person may adopt, if he chooses, the act of another who has assumed to act for him. Silence does not necessarily mean consent, but as a rule repudiation should always be prompt.*

CASES.

A man can not be compelled to lease what does not belong to him.

The owner of an oil well lot, on which was also situate a blacksmith's shop, which was known not to be the property of the owner of the land, agreed to lease the oil well and lot for a term of years, without any express reservation of the blacksmith's shop; the intended lessee insisted on obtaining a lease without any reservation of such shop, and filed a bill for that purpose. Bill dismissed, with costs:

Morris v. *Kemp*, 13 Chy. 487.

Trustees.

Power of trustees to grant lease for twenty-one years, with provision for compensation for improvement or renewal:

Brooke v. *Brown*, 19 O. R. 124.

Result of a lease by guardian.

The guardian of an infant, tenant for life, without the sanction of the Court, executed a lease for years, during the existence of which the infant died, and an application having been made in the cause for an order on the tenant to deliver up possession, he was ordered to do so, and on payment into Court of the amount of rent in arrear, he was permitted to remove the buildings and erections put by him

* See R. S. O. c. 97, as to acts done under a power of attorney after the death of the constituent.

on the property (doing no damage to the realty), but the Court refused to allow him out of such rents for any improvements made by him upon the premises:

Townsley v. *Neil*, 10 Chy. 72.

Infant. An infant cannot during infancy avoid a lease by him reserving rent for his benefit:

Lipsett v. *Perdue*, 18 O. R. 575.

Executor. Under the Devolution of Estates Act an executor of deceased lessor can make a valid renewal of a lease pursuant to the covenant of the testator to renew:

C. P. R. v. *National*, 24 O. R. 205.

Act of tenant does not prejudice landlord's rights. Any act of the tenant, without the knowledge or sanction of the landlord, could only affect his interest as tenant, and could not prejudice the reversioner:

Dixon v. *Cross*, 4 O. R. 465.

Tenant may redeem. The right of a tenant for years to redeem a mortgage is absolute, and the Court has no discretion to grant or refuse redemption:

Martin v. *Miles*, 5 O. R. 404.

The elevator boy. Liability of landlord to tenant for injuries occasioned by negligence of employee of landlord in charge of an elevator:

Stephens v. *Chaussé*, 15 S. C. R. 379.

Who may re-enter. There can be no reservation of a right of re-entry to a stranger to the legal estate:

Hyndman v. *Williams*, 8 C. P. 293.

How ratification of another A person assuming to have an interest in property, though he had none, executed a lease or an agreement for a lease to a tenant; one of the true owners shortly afterwards took an assignment of the instrument and gave to the tenant notice of the

assignment; and successive owners demanded and received rent reserved by the instrument, insisted on the building of a barn which the agreement provided for, and otherwise recognized the existence of the agreement. Held, that the agreement was thereby confirmed and adopted, and was binding on the estate:

Simmons v. *Campbell*, 17 Chy. 612.

CHAPTER II.

TENANCIES

19. The "tenancies" recognized by law are various. In one sense, every man is a tenant, because in theory every holder of land holds it as tenant of the Crown. But the tenancies we have to deal with are "leasehold" tenancies. A tenant for life has a larger interest than a leasehold tenancy, so has a tenant in tail or tenant in dower. We have nothing to do with these tenancies. We have only, as just stated, to consider "leasehold" tenancies. "Tenancies."

20. Tenancies for terms of years, or as they are usually called "leaseholds," are created by lease, which is a contract whereby the use and possession of a house or land is granted by the owner (called the lessor) to "Leasehold." "Lease."

"Lessor." "Lessee." the hirer or taker (the lessee) for a fixed time (a term) at a stipulated remuneration (generally an annual rent), subject to such conditions or mutual obligations as they may mutually agree upon. The essence of this description of tenancy consists in it being for a term certain. Tenancies from year to year also arise by operation of law. These tenancies, although they may not arise from an executed lease, are also called "leasehold," because the law implies that the relationship of landlord and tenant has been created.

Entry by lessee necessary.

21. It should be remarked that although the lease grants the lands or house for a term to commence immediately, the interest or estate of the lessee (tenant) is not for all purposes complete until he has either by himself or his servants or agents entered upon the premises; for he can bring no action for any trespass previously committed thereon.

Caution as to agreements for leases.

22. Agreements for leases, except in the cases implied by law, are not usual in Ontario. Whenever they are used, great care should be taken.

Preliminary enquiries before leasing.

23. Before entering into a lease the intending tenant should always ascertain whether the person proposing to become his landlord is the owner of the land out and out, or whether he has only a lease of the pre-

mises. If the latter should turn out to be the case, this lease must be carefully examined, otherwise the new tenant, who would then have only what is termed an under-lease, and could of course take no more, nor in any other way, than his immediate landlord had power to give, might eventually find himself harassed and burthened by restrictions which he did not foresee, and which might render the property wholly unsuitable to the purpose for which he desired it. Perhaps also the consent of some person should be obtained before the under-lease is valid. "Under-lessee."

24. Enquiry should also be made in the registry office as to whether there is a mortgage on the property. If there is a mortgage in existence the consent to the lease of the person holding the mortgage should be obtained; if not, and default is made in payment of the mortgage, the person claiming under the lease subsequent to the mortgage could be turned out by the mortgagee. If, on the other hand, a lease is made, and after the lease the owner of the land executes a mortgage, the mortgagee can only take subject to the rights of the lessee; that is to say, as to all leases under seven years in length. The registry law of Ontario requires leases over seven years to be registered.* If the person Rights of a mortgagee. Registration of leases. Effect of failure to register.

*The Registry Act, 1893, sec. 39, says: "This Act shall not extend to any lease for a term not exceeding seven years where the actual possession goes along with the lease; but it shall extend to every lease for a longer term than seven years.

having such a lease does not register it, and the owner of the land executes a mortgage, and the mortgagee registers this mortgage in the registry office without notice or knowledge of the prior lease, then the mortgage would cut out the lease. If the mortgagee had notice of the prior lease, the mortgage might or might not cut out the prior lease, according to the circumstances of the case. Therefore, any person having a lease of over seven years should register it in the same way that he would a deed. If a person proposes to take a lease of property and applies to the mortgagee when a mortgage is on the land for the mortgagee's consent, and it is refused, the proposed lessee then completes the transaction at his peril.

Registration of agreement for lease.

25. The same remarks apply to an agreement for a lease as to a lease. If a man wishes to protect himself under a proposed agreement for a lease he should register it. Otherwise he may be cut out by some person who has acquired an interest subsequent to himself, and has registered the document under which he claims.

26. I explained at the beginning of this chapter that "leasehold" tenancies are all that we have to consider. Such tenancies are either from year to year—for a shorter

term than a year—or for a fixed and definite term of years.

Distinction between term certain and indefinite term.

27. Parties renting must carefully bear in mind the distinction between renting for a term certain and for an indefinite period. If a man lets a house for a term certain, he has no right to hold on after the expiration of that time. If he does hold on after the expiration of that time and pays rent, he becomes a tenant from year to year; but many people forget that if a house or other property is rented for one year, or two years or five years, that their occupation is fixed for that time; they remain liable for the rent for that period, and are entitled to occupy the house or premises for the same period; they cannot by abandoning the premises escape their liability for rent, nor can the landlord claim the premises until the time has expired or default made. It is necessary to state these distinctions very clearly, because there is apparently much misconception on this point.

Tenancy from year to year by presumption of law.

28. A tenancy from year to year arises by presumption of law when the tenant coming in under an agreement for lease has made a payment of rent. If the tenant can show that the rent was paid with reference to the agreement, then it is not a tenancy from year to year, but a tenancy according

1. Entering under agreement for lease.

to the agreement. The tenant would be called upon to show in what method the payment was made. If a tenant under a lease for a term of years holds over after the expiration of his term, he is, until he has paid the rent subsequently falling due, merely a tenant by sufferance and may be evicted at any moment, and is liable for rent at the old rate up to the time of his eviction. Directly he has paid the rent to the landlord, and the landlord has received any such rent, he is considered a tenant from year to year, and must give, and is entitled to receive, the proper notice to quit.

2. Overholding and paying rent.

Tenancy from year to year, how created by agreement.

29. If one man, either by word of mouth or by writing, let to another houses or lands at a yearly rental and for an undefined time, a tenancy from year to year will be created unless the letting is accompanied by some stipulation to the contrary. The point about this tenancy is this: that if a tenant enters into possession of premises at a yearly rental and for an undefined time, he is entitled to hold them, and he is liable to pay rent for them for a twelve-month. If the requisite notice to determine the tenancy at the year's end be not given by either landlord or tenant, another year's tenancy is thereby created, and so on from year to year until such notice (expiring on the anniversary of the day on which the tenancy first commenced) shall have

Notice to quit.

been given by either party. The day on which the tenancy commences is either the day named at the time of letting, or if no day is named, the day on which the tenant enters into possession. In the absence of any other agreement, the requisite notice is one of six months, terminating, as I have already said, on the anniversary on which the tenancy began; but the notice may be by agreement, a quarter's or a month's, or, in fact, any other. (See chapter XIV.)

Length of notice required.

30. A yearly tenancy can be created verbally, but it should not be created in this manner, because, until the tenant enters on the premises it is a mere agreement for an interest in the land, and if not in writing, as we will presently see, is void. Therefore, if the person who wishes to be the tenant refuses to take possession of the premises, the would-be landlord would have no remedy for breach of contract.

Agreement for yearly tenancy.

31. A tenant from year to year sometimes underlets the premises, as he has a perfect right to do, either because he wishes to leave them before the expiration of the proper notice, or for the sake of making something by subletting. The person coming in as under-tenant must satisfy himself that the rent to the superior landlord is paid, and if

Under-tenant.

Enquiries to be made

there is a written lease so providing, that the consent of the landlord to the subletting has been obtained. He should also investigate whether the taxes have been paid or not.

Reduction of rent.

32. If the landlord in the middle of the term reduces the rent, or if the rent is reduced without any further change in the tenancy being made, no effect is produced on the tenancy itself.

Case of two years' tenancy at least.

33. If a house is let for one year, and so on from year to year, in that case the tenant must retain the house for two years. He cannot give notice to quit until six months before the expiration of the first year of the tenancy from year to year, which in this case is a tenancy for two years at least.

Constructive tenancy for periods of a year.

34. The next kind of tenancy to consider is that for terms shorter than a year. If premises for the purpose of business houses or apartments are let for an undefined period at a rent collected in reference to any shorter period than a year, as for instance, at so much a quarter, month or week, the hiring will be construed as quarterly, monthly or weekly in the absence of any circumstances or agreement to the contrary.

35. There are two other kinds of tenancies which must be mentioned, because they

may arise, but when persons find themselves in the situation of being either landlord or tenant under the circumstances which create these tenancies, they had much better consult a solicitor at once.

Tenancy at will.

36. Tenancies at will arise where a party is let into the possession of land on the terms that he is either compellable to leave at the will of his landlord or entitled to go at his own pleasure. It arises by operation of law in the case where a purchaser enters into possession on the execution of a contract of sale and before the execution of the conveyance to him.

37. Courts of law lean as much as possible against construing demises where no certain term is mentioned to be tenancies at will, but rather hold them to be tenancies from year to year, so long as both parties please, especially where an annual rent is reserved.

Tenancy by sufferance.

38. A tenancy by sufferance is that relation which subsists between a landlord and tenant when the latter holds over after the expiration of his term without the assent, but also without the expressed dissent, of the landlord. I have already stated that generally speaking the receipt of rent by a landlord turns this tenancy into a tenancy from year to year.

Servant's occupation of master's premises.

39. A servant in the occupation of premises of his master, and receiving less wages on that account, is not a tenant. A caretaker occupying rooms in a public building, say for purpose of offices, on similar terms, is also not a tenant. If the occupation of the premises or rooms forms a part of the stipulated remuneration of the servant when he entered his employer's service, he will be compellable to leave both premises and employment by the same notice. If, on the other hand, by a subsequent arrangement, it was agreed that the occupation should be equivalent for so much wages, and no time was fixed for the continuance of the arrangement, either party may end it at any time by giving reasonable notice. Reasonable notice depends on the circumstances of each case.

CASES.

A lesser estate merges in a greater.

Defendant granted land in question to S. to hold "to the said S. and the heirs of his body for twenty-one years, or the term of his natural life, from 1st April, 1853, fully to be completed and ended." Held, that S. took a life estate, in which the term merged:

Dalye v. *Robertson*, 19 U. C. R. 411.

Result of an assignment by a tenant of a

Where a lessee of land for five years demised the land for seven years: Held, that the demise in question operated as an assignment of the original term, and conferred upon the original lessor, in respect of the priority of estate thus created, a right of ac-

tion against the assignee of the term for the arrears of rent due under the original lease:

larger interest than he owned.

Selby v. *Robinson*, 15 C. P. 370.

Plaintiff leased to defendant for one year, with the privilege of holding for an indefinite time, on condition that three months' notice in writing should be given prior to leaving the premises, and prior to the termination of a full year by either party so inclined. Held, that defendant was bound to give three months' notice of his intention to quit at the end of the first year:

Case decided on the wording of an agreement to give a certain notice of termination of tenancy.

Counter v. *Morton*, 9 U. C. R. 253.

The plaintiff's agent offered to lease a house to defendant at £100 a year, payable quarterly, and defendant assented to the terms, but never occupied. Held, that he was not liable for the rent. It was alleged that after the defendant had been told what the rent would be, he got the key by the agent's directions, and went to examine the house, and leaving the key in the door returned and said he would take it. Apparently, this would not have altered the decision:

The defendant's actions did not amount to an actual taking of possession.

Bank of U. C. v. *Torrant*, 19 U. C. R. 423.

A., living at Collingwood, wrote to B., at Toronto, on the 5th July, 1859, to the effect that he would give £40 a year for his house, and pay taxes, adding, "If you agree, telegraph at once to that effect, and I will take it." On the 6th B. telegraphed, "You may have the store for one year on terms of your letter." A. obtained the key from the former tenant on the 11th and first entered on that day. Held, that there was a perfect demise; that the rent commenced from acceptance by B. of A.'s offer, not from the time when A. entered; and that B. was therefore entitled to distrain for a year's rent on the 7th July, 1860:

This case is one where a tenant was held to be liable as such from a date before he actually took possession

Prosser v. *Henderson*, 20 U. C. R. 438.

The term of a lease is exclusive of first day and inclusive of last anniversary.

Under a lease dated 1st October, 1857, habendum for five years from the date thereof, "yielding and paying therefor on every first day of October during the said term"; it was proved that the first year's rent had been paid in advance. Held, that the term included the whole of the 1st October, 1862:

Held, also, that the rent was not payable in advance for the subsequent years:

McCallum v. *Snyder*, 10 C. P. 191.

The lessee had the right of purchase on his desiring to do so within the period of two years after the date of the commencement of the term, the 1st of April, 1852. On the 1st of April, 1854, the desire of purchasing was declared. Held, in time, the day of commencement of the term, 1st of April, 1852, being exclusive:

Sutherland v. *Buchanan*, 9 Chy. 135.

Registration of lease.

A lease of land for four years, with a covenant to renew for four years more, was held not to require registration, actual possession having gone with the lease; and such a lease, though not registered, was held valid as respects the covenanted renewal as between the lessee and subsequent mortgagees of the lessor:

Latch v. *Bright*, 16 Chy. 653.

Notice to quit must be given to a tenant from year to year.

A tenant from year to year cannot be ejected without regular notice to quit. Abortive negotiations which fall through do not deprive him of this right:

Crookshank v. *Crookshank*, M. T. 5 Vict.

A tenancy from year to year created

Where the tenant enters under a verbal lease void under the statute, a tenancy from year to year may be implied though no rent has been paid. Under the circumstances of this case (a verbal lease followed by entry and clearance of land): Held, that

the plaintiff was a tenant from year to year, and defendant was a trespasser in entering upon him: though no rent paid.

Gibboney v. *Gilboney*, 36 U. C. R. 236.

Where D., being tenant for life of two lots, gave M. verbal permission to occupy one lot and build upon it on condition that he should pay the taxes on both lots; and M. accordingly went on and built and paid the taxes for several years: Held, that a yearly tenancy had been created, and that D. could not eject M.'s subtenant without notice to quit: Yearly tenancy created; notice to quit necessary before premises can be recovered.

Davis v. *McKinnon*, 31 U. C. R. 564.

A defendant not in possession under any concluded agreement regarding the lease, is merely a tenant at will: A tenancy at will.

Lennox v. *Westney*, 17 O. R. 472.

A tenant at will cannot sue his landlord for ousting him from possession: Tenant at will.

Henderson v. *Harper*, 1 U. C. R. 481.

A person put in possession of a brick yard and house thereon was dismissed by his employer, but refused to give up possession until certain accounts were adjusted. Held, that he was an "occupant" overholding without color of right: Servant in occupation of master's premises.

Fowke v. *Turner*, 12 L. J. 140.

CHAPTER III.

LEASES.

Precise forms not necessary but safer.

40. No precise words or technical forms of language are requisite to constitute a lease. Whatever words are sufficient to explain the intent of the parties that one shall divest himself of the possession and profits of the land, and the other come into them for a determinate time, are of themselves sufficient, and will in the construction of the law amount to a lease for years as effectually as if the most formal and regular words had been made use of for that purpose. It is, however, hardly necessary to observe that it would be in the highest degree imprudent to depart from the settled and established forms which experience and repeated decisions of the Courts have sanctioned.

Statutes as to form of leases.

41. The statutory requirements as to the form of leases are as follows:

Statute of Frauds* (29 Car. II. c. 3), section 1. All leases and other interests in lands made and created by parol, and not put into

* This is the name of a statute passed in the reign of Charles II. in order to prevent fraud. Its chief object is to require "writings" as evidence of certain contracts specified in it.

writing by the parties making or creating the same, or their agents lawfully authorized in writing, are void and have the effect of estates at will only; except,

Section 2. Leases not exceeding three years from the making whereon is reserved as rent two-thirds of the full improved value.

Section 4. An agreement for a lease or for any interest in lands to be binding on the party to be charged must be signed by him or his agent.

42. Therefore, a lease not exceeding three years at a rental of two-thirds of the full improved value is good by parol. A parol agreement for such a lease is void as against the party making it.

In the case of the agreement, a parol authority to the agent making it will suffice; in the case of the lease, the authority to an agent making it must be in writing.

43. But R. S. O. c. 100, s. 8, says: A lease, required by law to be in writing, of land is void at law unless made by deed (that is, under seal). The authority to an agent must be also by deed, on the general principle that the authority to contract must be of no less a character and nature than the contract.

Verbal leases unadvisable.

44. Verbal leases should never be made for these amongst other reasons. Doubts may arise in respect to the precise words that passed, whether they amounted to the actual letting then and there perfected, and leaving nothing to be done but the taking possession, or merely to an agreement that one party would let and the other would take, the letting and the taking to be carried out at some future meeting, or by some writing to be drawn up. Now, by the Statute of Frauds above quoted, although actual leases for terms not exceeding three years are valid if made orally, yet mere agreements for such leases are void unless reduced to writing. Consequently, even supposing the tenant entered into possession and paid rent, if the jury were to find that words had been used which merely amounted to an agreement for a lease, the tenancy would only be one from year to year, liable to terminate by a notice to quit, and if no rent had been paid it might be that the tenant would be able to leave, or be liable to be turned out at any moment. If, indeed, the tenant had not only entered, but had in pursuance of and in reliance upon the agreement laid out money in improving the premises, the Court might then on the tenant's motion compel the landlord to execute a valid lease, but it would be after a lawsuit. Further, even if words amounting to a present letting were clearly used (still more

Agreements for lease.

if such words had not been clearly used), and the tenant without having entered upon the premises refused to carry out the arrangement, the landlord would have no remedy for the breach of contract.

Contents of a lease.

45. A lease commences with what are generally called the premises. This word does not mean the premises granted in the lease, but means the date of the lease, the names of the lessor and lessee, the consideration for which the lease is granted, and then the subject matter of the lease.

1. Premises.

2. Habendum.

46. (2) The next part is the habendum, which specifies the duration of the lease. Generally speaking, leases last during the whole anniversary of the date from which they are granted. If a lease is granted for an alternative period, as say, seven, fourteen or twenty-one years, then, if nothing is said as to who is to have the option of determining or continuing the lease at the end of the respective periods, the choice rests with the lessee.

3. Reddendum.

47. (3) The reddendum reserving the rent to be paid by the lessee.

4. Covenants.

48. (4) The covenants. A covenant is a promise or agreement, and any promise or agreement under seal is a covenant; no pre-

cise words are requisite to constitute a covenant. It is sufficient if it can be clearly collected that something is to be done or not to be done by one of the parties to the deed.

Implied covenants.

49. There are such things as implied covenants;* for instance, on the part of the lessor, that the lessee shall quietly enjoy the land or house demised; on the part of the lessee, that he will pay the rent; that he will commit no waste; that he will do proper repairs; that he will cultivate in a husband-like manner; that he will not cut down timber. It is evident that the less parties rely upon these implied covenants, the less likely they are to go to law; each man should have put in black and white what he expects the other to do for him, and what he is willing to do for the other.

Where there is no implied covenant as to condition of premises.

50. The fact of granting a lease or letting a house or land on an annual tenancy creates no implied agreement on the part of the landlord that the one is reasonably fit for habitation or the other for cultivation. If it turns out not to be the case it will furnish no excuse to the tenant for refusing to pay his rent.

* For covenants now implied in leasehold transactions, see later in chapter on Covenants not included in statutory Short Form of Leases.

51. The landlord of an unfurnished house, letting it on a yearly tenancy, does not any more than if granting a lease warrant it as fit for habitation. If a tenant once enters or signs an agreement to take it, no matter whatever state it may be in, he is without redress, unless he has previously obtained the landlord's written agreement to put it in repair. Even if the house were to tumble down he might be compelled to pay rent until he is able to release himself by giving the regular notice. An agreement on the part of a landlord to make repairs should specify the repairs to be made as accurately as possible, and also mention a fixed time by which they will be done.

No implied covenant as to condition in case of unfurnished house.

Agreement to repair.

52. Contracts for the hiring of a furnished house, whether for a term or from year to year, or even a less period, and also contracts for letting furnished rooms, are peculiar. They are contracts of a mixed nature, partaking partly of the character of a lease of real property and partly of that of a contract for the letting and hiring of movable chattels.

Contracts for hiring of a furnished house.

53. There is an implied warranty on the part of the lessor that a ready furnished house or lodging is reasonably fit for habitation or occupation by the tenant. If the furniture is not fit for use or encumbered with a nuisance of so serious a nature as to deprive

Implied covenant as to condition of furnished house.

the tenant of all essential enjoyment of it, he is entitled to throw up both house and furniture, and bring action against the landlord for breach of contract. The fact that the beds in a ready furnished house were so overrun with bugs that they could not be slept in, was held to be a nuisance which would entitle the tenant to abandon the premises.

Search for chattel mortgage necessary.

54. If a person proposes to lease a furnished room or a furnished house, he should satisfy himself that there is no chattel mortgage registered against the furniture. If a chattel mortgage is registered the consent of the chattel mortgagee should be obtained. The rights of a chattel mortgagee with regard to chattels, as far as the tenant or lessor of the chattels is concerned, are as extensive as those of a mortgagee of real property. If a landlord has not mentioned the fact to his proposed tenant that there is a chattel mortgage on the furniture intended to be leased, and the mortgagee claims possession of the goods, the tenant would have the right to bring an action against the landlord.

"The usual covenants."

55. Sometimes an agreement for a lease stipulates that the lease shall contain "the usual covenants." This mode of expression is not safe. It is better to say that the lease shall contain the covenants required by the Short Form of Leases Act.

56. Some covenants are said to be real and to run with the land, while others are merely personal and do not run. The expression "running with the land" is explained later on. (Chapter XI.) Covenants "running with the land."

57. In dealing with the subject of covenants it cannot be too plainly impressed upon the reader that whatever either party requires or expects from the other should be inserted in the lease itself; no verbal addition or understanding will be allowed; the lease must speak for itself and be a complete exposition of the intention of the parties. Oral variations of contracts not permitted.

58. If a lease is given without any covenants, then the law implies on the part of the landlord a promise that the tenant shall peacefully enjoy the demised premises free from interruption by himself or anyone claiming to be entitled through him, or even claiming against him. If the tenant is evicted by any one of these, he may not only refuse to pay rent accruing due after the eviction, but may bring an action against his landlord for damages arising over the loss of his holding. If the tenant is evicted or disturbed by a wrongdoer, the remedy is against the wrongdoer and not against the landlord. Effect of eviction of tenant.

59. If a tenant be evicted from any part of the demised premises by the landlord, or

anyone claiming through him, the whole rent will be immediately suspended, and nothing will be payable for the interval that elapsed since the last day (quarter-day or otherwise) on which rent was payable.

60. But if the tenant be evicted from a part only of his land by one rightfully claiming by title paramount to or against his landlord, the rent will be apportioned, and so much only as may be considered fairly applicable to the part in question will be suspended.

61. But a mere entry by the landlord, if permitted by a covenant, or even a trespass by a stranger, will not suspend the rent. In the two latter cases the tenant will, of course, have his remedy by action of trespass against the wrongdoer.

5. Exceptions.

62.(5) The exceptions, e.g., trees in a farm lease; a salt bed in a salt district; or a coal oil boring in a coal oil district.

6. Provisos and conditions.

63. (6) Provisos and conditions. In a lease these are generally inserted for the purpose of enforcing due payment of rent or of performance of covenants. This is generally done by declaring the lease void or giving the landlord the right to re-enter upon the premises in case of breach of covenants,

64. After a lease is executed it is, of course, competent to the parties to alter it or amend it, and any alteration or amendment must be construed according to the intention of the parties. As above pointed out, the lease itself should before execution be made so perfect that nothing else is necessary to ascertain what the parties intend. Subsequent alterations or additions.

65. In Ontario the Legislature has provided a short form of lease, which is the one generally used for leases of houses or stores. Farm leases are also often drawn on this form, but farm leases require so many special covenants that a further form for farm leases is supplied by stationers. Short Forms of Leases Act. Farm leases.

66. Persons who use these forms must be cautioned that any alteration of the printed words allowed by the Act may defeat the intention of the parties. By the statute the short clauses are declared to stand for the more extended clauses set out in the second column of the Act. Alterations in forms.

67. These extended clauses confer certain rights on landlords, and provide certain securities for tenants which may be lost if the parties in using short forms do not exactly adhere to the text of the statute. Great care is necessary, therefore, that no alteration

be made in the printed forms of covenants. If either the landlord or the tenant desires to alter these covenants in any way, or to add further covenants, they should be added by special clauses relating to the matter in hand.

Employment of professional assistance.

68. If the transaction between the proposed landlord and tenant relates to a long period, or covers valuable property upon which improvements are to be made by either party, or if special covenants are required, it is better for the persons interested to put the matter in the hands of a solicitor, and instruct him to draw the necessary papers. As a general rule, solicitors who are trained for the purpose are safer guides than unlicensed conveyancers, who may or may not understand what they are attempting to do. If the solicitor is guilty of gross negligence or wilful misconduct, he is liable in damages to the party who is damnified by his mistake. An unlicensed conveyancer may or may not be liable according to the circumstances of the case.

I next print in full the short form of lease with the short covenants and the long ones they stand for.

CASES.

Sir George Jessel, M.R., in *Walsh* v. *Lonsdale*, 21

Ch. D. 9, says: There is an agreement for a lease under which possession has been given. Now, since the Judicature Act, the possession is held under the agreement. There are not two estates, as there were formerly; one estate at common law by reason of the payment of the rent from year to year, and an estate in equity under the agreement. There is only one Court, and the equity rules prevail in it. The tenant holds under an agreement for a lease. He holds, therefore, under the same terms in equity as if a lease had been granted, it being a case in which both parties admit that relief is capable of being given by specific performance.

Effect of fusion of Courts of Law and Equity upon tenancies formerly void at law under Statute of Frauds.

Since the Judicature Act, the result of a verbal lease of real property for more than three years to continue until and to expire upon a day certain, where the tenant has taken possession, is, that he is bound to give up possession at the end of the stipulated period without any notice to quit:

Magee v. *Gilmour*, 17 O. R. 620, 17 A. R. 27.

Effect of verbal lease since Judicature Act.

The plaintiff sued defendant for damages for refusal to admit him into possession of land, which he alleged the defendant had verbally agreed to give him a lease of for sixteen months. Held, that the evidence failed to shew an actual letting, but that if such had been proved the plaintiff must fail under the fourth section of the Statute of Frauds, as the action was brought in respect of an agreement for an interest in land:

Moore v. *Kay*, 5 A. R. 261.

Effect of the Statute of Frauds.

An agreement in writing, whereby A. agreed to rent to B., for three years from date, for £50 per annum, with taxes payable quarterly during occupation, B. to spend £25 in improvements: Held, a lease, and not a mere agreement for a lease.

The Statute of Frauds says: A lease by parol can only be made where it does not exceed three years from the making thereof. If a lease is required to

be in writing it must be by deed. This lease was for three years, that is, it was for a term not exceeding three years, and therefore could be by parol. It was in writing. Writing was not necessary, and so the seal was not necessary either:

Grant v. *Lynch*, 14 U. C. R. 148. Same case also reported 6 C. P. 178 on point of surrender.

Verbal negotiations do not complete a lease.

As to a portion of the property, a saw mill, one B. said that on a Saturday he rented it verbally from the plaintiff for a year, and it was intended to have a written lease; but on Monday the defendant put some one else in possession and refused to let him in, after which he had nothing further to do with it. It was not shewn that either the rent or the terms of the tenancy had been agreed upon. Held, not a lease, but an agreement only, and that the defendant could not set it up to defeat the plaintiff's title.

In this case there was no agreement in writing, and the defendant, therefore, could not be compelled to carry out his verbal bargain. If B. had taken possession there would have been a complete agreement, but he did not, so the other party defeated his claim:

Kyle v. *Stocks*, 31 U. C. R. 47.

There was no seal on this agreement.

"M., for the consideration hereinafter named, agrees to demise and lease to H. these premises, etc., for the period of three years certain, at 10s. cy. per day, payable monthly in advance during said term, and with the privilege to said H. to hold the same for a further period of two years, at the same rent, payable as aforesaid. The said H. agrees to take the said premises from said M. for the price and terms aforesaid, and to pay all taxes upon the said premises, possession to be given whenever the first monthly payment of rent is made." Could the above in writing (not under seal) be in any case construed as more than an agreement for a lease? It could not

be regarded as being for a term not exceeding three years from the making, or, in other words, was for a term exceeding three years, and so by the Statute of Frauds would be required to be in writing, and therefore, by our legislation, to be under seal.

Hurley v. *McDonell*, 11 U. C. R. 208.

A verbal agreement held insufficient under the 4th section of the Statute of Frauds.

A. leased a farm to B., upon condition that B. was to deliver to him one-half of the wheat raised on it. B. was to harvest and thresh and deliver the wheat to defendant's granary. Held, that under this agreement they were not partners in the wheat while it grew in the field, but stood to each other in the relation of landlord and tenant; and that, therefore, no legal property in the wheat could vest in A. until B., his tenant, had threshed it and delivered to him his portion:

Haydon v. *Crawford*, 3 O. S. 583.

Agreement to work a farm on shares—nature of relationship created.

L., by instrument not under seal, dated 31st October, 1857, leased to S. O., one of the defendants, for five years. On 31st March, 1858, he mortgaged the premises to the plaintiffs, and on the 8th June, 1858, by indenture, he again leased the same premises for five years to S. O. The mortgagees brought an action for possession of the property against S. O. Held, that though the indenture of June, 1858, as between the parties to it, extinguished the tenancy from year to year created by the instrument of 31st October, 1857, yet it did not entitle the plaintiffs as mortgagees to succeed, they not being parties to it:

Caverhill v. *Orvis*, 12 C. P. 392.

Notice the result of the want of a seal in the first lease in this case. S. O. became tenant from year to year for five years determinable during the term by half a year's notice.

The word "lease," differing from "grant" or "demise," implies no contract for entry and quiet possession:

Ross v. *Massingberd*, 12 C. P. 62.
Harvey v. *Ferguson*, 9 U. C. R. 431.
See *Saunders* v. *Roe*, 17 C. P. 344.

"Lease," effect of.

"Demise," effect of.

The word "demise" in a lease raises an implied covenant to give possession:

Saunders v. *Roe*, 17 C. P. 344.

One use of a lease void in point of form.

A lease void for the creation of a term (not being executed according to law) may be looked at to ascertain the conditions of occupation:

Galbraith v. *Fortune*, 10 C. P. 109.
Lyman v. *Snarr*, same vol., 462.

Mining lease considered:

Palmer v. *Wallbridge*, 15 S. C. R. 650.

That premises were uninhabitable, no defence.

In an action for rent: Held, no defence that the house became unfit for habitation in consequence of the roof admitting water, and for want of sufficient drainage, whereby the said house became wet, damp, unwholesome, noisome, and offensive, of which the plaintiff had notice, and defendant thereupon quitted the same before the commencement of the time for which rent was demanded:

Denison v. *Nation*, 21 U. C. R. 57. Compare also *Wilkes* v. *Steele*, 14 U. C. R. 570.

A hard case but unforeseen

Plaintiff leased to defendant land in front of the city of T. with the use of the water adjacent. The corporation, in construction of an esplanade, cut off the access to the water. Held, that defendant was bound to pay rent and fulfil his contract:

Lyman v. *Snarr*, 9 C. P. 104.

Damage by ice.

Damage by ice to a wharf or pier not considered to be damage caused by tempest, so as to bring it within the exception of "reasonable wear and tear, and accidents by fire and tempest excepted:"

Thistle v. *Union Co.*, 29 C. P. 76.

Goods leased burned. Provide

Lessee of goods covenanted to restore them to the lessor, "at the expiration of the term, in as good order as they then were, reasonable wear and tear excepted," and the goods during the term were de-

stroyed by fire without lessee's default. Held, lessee not liable to replace:

Chamberlen v. *Trenouth*, 23 C. P. 497.

for this contingency.

A. leased to B. a house for fifteen years, and during the term, by agreement, A. therein assented to an assignment by B. to C., and gave C. the option to purchase the fee within one year at a given sum, payable by instalments; and C. at the time of the agreement paid A. £50, to be on account of purchase money in case he elected to purchase, otherwise to go for rent. There was a proviso in the original lease that should the house be burnt, the rent should cease. C. did not purchase, and the premises were afterwards burned, at which time, long before the expiration of the lease, the rent due was £12 10s. Held, that notwithstanding the proviso, A. was entitled to rent until the £50 was absorbed:

Pulver v. *Williams*, 3 C. P. 56.

Be careful to fix your liability in case of fire.

Plaintiff sued defendant for trespass, and for cutting and carrying away grain. Defendant set up that the plaintiff was lessee of the defendant under an indenture of lease; that on the negotiation for, and execution of that lease, it was verbally agreed between them, and the true agreement was, that the defendant should have the right to enter and harvest the crop then in the ground sowed by him; that when the lease was executed a reservation of such right was suggested, but was omitted on the plaintiff's assurance that it was unnecessary, as the agreement between them was well understood, and defendant would be allowed to take the crop; and that the entry in pursuance of this agreement is the trespass complained of. Held, to be a good defence, for the independent verbal agreement, made in consideration of the defendant signing the lease, was good as an agreement, though defendant by the

What trouble would have been saved had the whole agreement been put into writing.

fourth section of the Statute of Frauds might be prevented from suing on it:

McGinness v. *Kennedy*, 29 U. C. R. 93.

A verbal arrangement leads to a lawsuit.

A party entered into possession and sowed a crop upon the verbal understanding that he should have the product thereof, but no special time for occupation was mentioned. Held, that a sufficient tenancy was created to entitle him to such crop:

Mulherne v. *Fortune*, 8 C. P. 434.

Do not alter forms

As to the use of short form covenants and the necessity for not altering them:

See *Emmett* v. *Quinn*, 7 A. R. 306.
Lee v. *Lorsch*, 37 U. C. R. 262.

CHAPTER IV.

LODGERS.

Lodgers.

69. Lodgers* have in general the same rights and are subject to the same liabilities as other tenants. They are, in fact, tenants of a different kind of holding and for a shorter period than from year to year of a house, but they are not tenants of a different kind. The

* There is a distinction between a lodger and a boarder. A lodger is a person who engages rooms only. A boarder is one who engages rooms and board, or board only. A boarder in our meaning of the word is scarcely ever found in England. Another term common in Ontario is a "roomer," that is to say, a person who engages rooms, furnished or unfurnished, without board. These persons are strictly lodgers.

law as to payment of rent by a lodger, and as to remedies against him for refusing to give up possession, are the same as in the case of a tenant of house or lands. An innkeeper has a right of lien, and may detain the goods of a guest for his bill. The keeper of furnished rooms has no such lien, but can, after effecting regular distress, detain the goods of a lodger until he has quite paid the rent. It must be borne in mind that each set of rooms in a house with a common outer door does not constitute separate tenements with reference to the landlord's right of distress. He has a perfect right to break down any of his lodger's doors and seize and execute distress on his goods.

Innkeeper's right of lien, lodging-house keeper no right of lien.

70. The mere putting a bill in the window to show that the premises are to let, or lighting fires in the rooms will not prevent the landlord from recovering the rent from a tenant who has quitted without notice, where such is necessary, but if he let them, no matter for how short a time, he cannot claim any subsequent rent, although the rooms may afterwards have become and remain vacant during a considerable part of the time that would have been included in the proper notice.

What actions amount to taking possession.

I have already stated that the tenant of furnished rooms may quit them without any notice if the furniture is unfit for use.

Use of conveniences.

71. When lodgings are let in a house it is implied, unless agreed to the contrary, that the tenant should have the use of those domestic conveniences which are attached rather to the house itself than to any particular part of it, and which are indispensable to the use of any rooms in it as a residence. Amongst these are the skylights and staircase window, the water closet, door bell and knocker. A distinction is made in the use of these conveniences where the premises are let in flats; only those conveniences which belong to a particular flat are rented therewith. Means of access to each particular flat being obtained by a common entrance and staircase.

72. A tenant, if deprived of the use of any of the conveniences appertaining to the premises rented, has an action for breach of contract, but a lodger cannot insist upon having his name painted on the outer door, or affix thereto a door-plate.

Duty of lodging-house keeper.

73. As the keeper of a lodging-house has the general possession and government of it, he is bound, for the protection of the persons and property of the lodgers, to take such precaution against fire and robbery as may reasonably be expected from a prudent householder. He will be liable if they incur loss in consequence of the doors not being pro-

perly secured at night, or by improper or doubtful characters being permitted to assemble at late hours, or from any want of care on his part in the selection of honest and competent servants. If, after he has exercised such care, the goods of the lodger have been stolen in consequence of the negligence of the servants, the lodging-house keeper is not liable unless the goods have been specially confided to his custody.

Liability for damage to furniture.

74. If a lodger merely has the use of the furniture in his rooms, the landlord retaining possession of them and looking after and taking care of them by his own servants, the tenant is only bound to use them himself, and to see that his family and guests use them in a reasonable manner. If, as is sometimes the case in apartments, and most frequently where a furnished house is taken, the tenant brings in his own servants, and has not only the use but the possession of the furniture and household utensils, he would be bound also to see that their care and preservation is propelry attended to, and to return them at the expiration of his tenancy in good order and condition, deteriorated only by ordinary wear and tear and reasonable use. If such a tenant receives plate, linen, etc., and agree "to leave them as he found them," he must return them clean, if he received them in that state.

Inventory of rented furniture.

75. In cases of taking or letting furnished houses, it is best to affix to the lease an inventory of the articles taken over, which should be checked over and signed by both parties, so as to prevent mistakes. If this inventory is not made disputes are certain to arise.

Contract to let lodgings must be in writing.

76. It must be remembered that an agreement for the letting of lodgings is a contract for an interest in land within the Statute of Frauds, and that unless it is reduced to writing no action can be maintained upon it against the person who has agreed to take apartments, but has never entered and taken possession of them, and has refused to pay the rent agreed upon.

Powers of lodging-house keeper as to recovering premises.

77. A lodging-house keeper has no right to eject by forcible means or with the aid of a policeman, a lodger who insists on remaining after the conclusion of his term, or the expiration of a proper notice to quit. But he will, in such a case, be justified in taking advantage of his tenant's temporary absence to fasten up the doors of his apartments and to prevent his returning to them. He must of course, in that case, be ready to deliver to the tenant on his return any property which he has left there.

Sale of lodger's goods.

78. If a lodger desert his apartments without paying his rent, and leave property there, the landlord will be perfectly safe in selling it, and applying the proceeds to the discharge of the rent, after giving the owner reasonable notice of his intention to do so by public advertisement; but the landlord must have very good grounds for believing that the lodger has really deserted the premises and left his goods, and that he has no intention to return and claim them.

Seizure of lodger's goods for rent.

79. The provisions of the law now relating to the seizure of lodgers' goods for rent due by their landlord are very clear. The following are the statutory provisions on the subject. They form sections 44 to 47 of the Landlord and Tenant Act (R. S. O. c. 143):

If a superior landlord shall levy, or authorize to be levied, a distress on any furniture, goods or chattels, of any boarder or lodger, for arrears of rent due to the superior landlord by his immediate tenant, the boarder or lodger may serve the superior landlord or the bailiff, or other person employed by him to levy the distress, with a declaration in writing, made by the boarder or lodger, setting forth that the immediate tenant has no right of property or beneficial interest in the furniture, goods or chattels so distrained, or threatened to be distrained upon, and that such furniture, goods or chattels, are the property or in the lawful possession of such boarder or lodger; and also setting forth whether any, and what amount by way of rent, board, or otherwise, is due from the boarder or lodger to the said immediate tenant; and the boarder or lodger may pay to the

superior landlord, or to the bailiff or other person employed by him as aforesaid, the amount, if any, so due as last aforesaid, or so much thereof as shall be sufficient to discharge the claim of the superior landlord; and to such declaration shall be annexed a correct inventory, subscribed by the boarder or lodger, of the furniture, goods and chattels referred to in the declaration.

If a superior landlord or a bailiff, or other person employed by him, after being served with the beforementioned declaration and inventory, and after the boarder or lodger shall have paid or tendered to the superior landlord, bailiff, or other person, the amount, if any, which by the last preceding section the boarder or lodger is authorized to pay, shall levy or proceed with a distress on the furniture, goods or chattels of the boarder or lodger, the superior landlord, bailiff or other person, shall be deemed guilty of an illegal distress, and the boarder or lodger may replevy such furniture, goods or chattels, in any Court of competent jurisdiction, and the superior landlord shall also be liable to an action at the suit of the boarder or lodger, in which action the truth of the declaration and inventory may likewise be inquired into.

Any payment made by a boarder or lodger pursuant to section 44 of this Act, shall be deemed a valid payment on account of the amount due from him to the immediate tenant mentioned in the said section.

The declaration hereinbefore referred to shall be made under and in accordance with the Act respecting Extra Judicial Oaths.

CHAPTER V.

SHORT FORMS OF LEASES.

80. The statute respecting Short Forms of Leases is R. S. O. c. 106. It consists of four sections and two schedules, A and B. Schedule A is a brief form of lease. Schedule B is divided into two columns. The first column contains the short form covenants. The second column contains the long form to which the corresponding short form is equivalent. The Act provides:

(1) Where words in the short form are used they have the same effect as the long form.

(2) A deed, although it fails to take effect under the Act, may be good as between the parties. That is, the Court is bound, in case of dispute, to try and construe the parties' language so as to make it effectual, if it can.

(3) Every lease under seal, unless an exception is specially made, includes all outhouses, barns, yards, gardens or other appurtenances.

(4) Covenants not to assign or sublet without leave run with the land, and a proviso

for re-entry applies to breaches of either an affirmative or negative covenant.

The lease itself (Schedule A) runs thus:

This Indenture, made the day of in the year of our Lord one thousand eight hundred and in pursuance of the Act respecting Short Forms of Leases.

Between
of the first part; and of the second part.

Witnesseth, that in consideration of the rents, covenants and agreements, hereinafter reserved and contained, on the part of the said party (or parties) of the second part, his (or their) executors, administrators and assigns, to be paid, observed and performed, he (or they) the said party (or parties) of the first part, hath or have demised and leased, and by these presents do (or doth) demise and lease unto the said party (or parties) of the second part, his (or their) executors, administrators and assigns, all that messuage or tenement, situate (or all that parcel or tract of land) situate, lying and being (here insert a description of the premises, with sufficient certainty).

To have and to hold the said demised premises for and during the term of to be computed from the day of one thousand eight hundred and and from thenceforth next ensuing, and fully to be completed and ended.

Yielding and paying therefor yearly, and every year during the said term hereby granted, unto the said party (or parties) of the first part, his (or their) heirs, executors, administrators or assigns, the sum of to be payable on the following days and times, that is to say, etc., the first of such payments to become due and be made on the day of next.

81. The covenants (Schedule B) are as follows: The short form in large type is followed by its corresponding long form in smaller type. The Act, as it stood in the Revised Statutes, was amended in 1895. I have printed it as it reads when the amendments are inserted following each covenant by some annotation.

(1) That the said (lessee) covenants with the said (lessor) to pay rent:

And the said lessee doth hereby, for himself, his heirs, executors, administrators and assigns, covenant with the said lessor, that he, the said lessee, his executors, administrators and assigns, will during the said term pay unto the said lessor the rent hereby reserved in manner hereinbefore mentioned without any deduction whatsoever.

(See the chapter on Rent.)

(2) And to pay taxes:

And, also, will pay all taxes, rates, duties and assessments whatsoever, whether municipal, parliamentary, or otherwise, now charged, or hereafter to be charged, upon the said demised premises, or upon the said lessor on account thereof.

(See chapter on Taxes.)

(3) And to repair:

And, also, will during the said term well and sufficiently repair, maintain, amend and keep the

said demised premises with the appurtenances in good and substantial repair, and all fixtures and things thereto belonging, or which at any time during the said term shall be erected by the lessor, when, where, and so often as need shall be.

Printed as amended, 1895.

In Holderness v. Lang, 11 U. C. R. 1, it was held that the tenant was bound to keep in repair not only the demised premises, but also impliedly all fixtures and things erected or made during the term which he had a right to erect or make. The alteration in this covenant made by the Act of 1895 confines the liability to those erected by the lessor.

In a lease for years of premises made to G., his executors and assigns, and assigned by G. as to the residue of the term to the defendants, was contained after the usual covenants to yield up the same in good repair the following proviso:

A covenant limiting a general liability to repair (a good precedent.)

"Provided always, that nothing herein contained shall be deemed or taken, or construed to be deemed or taken, in any way to compel the said G., his executors, administrators or assigns, to give up the buildings at the expiration thereof, which are all wooden and liable to decay, in as sound and good a state as they now are; but such buildings are not to be wilfully or negligently wasted or destroyed; necessary repairs, however, for the preservation of the said buildings to

be done and performed by the said G. at his own proper cost and charge." Held, that the words recited constituted a covenant, and that such covenant ran with the land and bound the assignees of the lease, though assigns were not expressly mentioned in the instrument: Perry v. Bank of U. C., 16 C. P. 404.

(See chapter on Waste.)

(4) And to keep up fences:

And, also, will from time to time during the said term keep up the fences and walls of or belonging to the said premises, and make anew any parts thereof that may require to be new made in a good and husband-like manner, and at proper seasons of the year.

In this country the removal of a fence on a farm from one place to another is not necessarily a breach of a covenant to repair and keep fences in repair. Whether it would be so or not is a question of fact in each case: Leighton v. Medley, 1 O. R. 207.

(5) And not to cut down timber:

And, also, will not at any time during the said term hew, fell, cut down, or destroy, or cause, or knowingly permit or suffer to be hewed, felled, cut down or destroyed, without the consent in writing of the lessor, any timber or timber trees, except for necessary repairs, or firewood, or for the purpose of clearance, as herein set forth.

(See as to tapping of trees the chapter on Waste.)

(6) And that the said lessor may enter and view state of repair, and that the said lessee will repair according to notice.

And it is hereby agreed, that it shall be lawful for the lessor and his agents at all reasonable times during the said term to enter the said demised premises to examine the condition thereof; and further, that all want of reparation that upon such view shall be found, and for the amendment of which notice in writing shall be left at the premises, the said lessee, his executors, administrators and assigns, will, within three calendar months next after such notice, well and sufficiently repair and make good accordingly.

(See chapter on Waste.)

(7) And will not assign or sublet without leave:

And, also, that the lessee shall not nor will during the said term assign, transfer or set over, or otherwise by any act or deed procure the said premises, or any of them, to be assigned, transferred, set over, or sublet unto any person or persons whomsoever without the consent in writing of the lessor, his heirs and assigns, first had and obtained.

This covenant runs with the land. (See note at head of chapter, also directions at end.)

Conditions that the tenant shall not assign without the landlord's license, and also that he shall not underlet, are frequently inserted in leases in order to prevent the tenant from parting with his interest in the premises to an insolvent person, or to one of bad character. Unless, however, special

words are inserted such a condition will not be broken by an "assignment by operation of the law," that is to say, where the tenant's interest in the lease is sold by the sheriff under an execution, or if he makes a voluntary assignment for the benefit of creditors. If the lease require the landlord's license to be in writing, a license by word of mouth will not bind him. A tenant may, however, still remain liable to an action for damages for breach of the covenant not to assign. Neither a condition that the lessee shall not underlet, nor a covenant to the same effect, are violated by his taking lodgers.

(See Toronto Hospital Trustees v. Denham, 31 C. P. 203; Crawford v. Bugg, 12 O. R. 8.)

When a lease containing a covenant against assignment without the consent of the lessors is so assigned, the assignment containing a covenant by the assignee to pay the rent and indemnify the assignor, and the assignee goes into possession of the demised premises, he is bound by his covenant, and is liable, notwithstanding the non-assent of the lessors, to repay to the assignor rent accruing due after the assignment paid by the assignor to the lessors under threat of legal proceedings: Brown v. Lennox, 22 A. R. 442.

(8) And that he will leave the premises in good repair:

And further, the lessee will, at the expiration or other sooner determination of the said term, peaceably surrender and yield up to the said lessor the said premises hereby demised, with the appurtenances, together with all buildings, erections and fixtures *erected or made by the lessor* thereon, in good and substantial repair and condition, reasonable wear and tear, damage by fire or *tempest* only, excepted.

(Alterations made in 1895 in italics.)

The words "erected or made by the lessor," and "or tempest" were added in 1895.

(See cases on destruction of property under chapter on Rent.)

(9) Provided that the lessee may remove his fixtures:

Provided always, and it is hereby expressly agreed, that the lessee may, at or prior to the expiration of the term hereby granted, take, remove, and carry away from the premises hereby demised all fixtures, fittings, plant, machinery, utensils, shelving, counters, safes, or other articles upon the said premises in the nature of trade or tenant's fixtures, or other articles belonging to or brought upon the said premises by the said lessee, but the lessee shall in such removal do no damage to the said premises, or shall make good any damage which he may occasion thereto.

This proviso was added in 1895.

(See chapter on Fixtures.)

(10) Provided that in the event of fire, rent shall cease until the premises are rebuilt:

Provided also, and it is hereby declared and agreed, that in case the premises hereby demised, or any part thereof, shall at any time during the term hereby agreed upon be burned down or damaged by fire so as to render the same unfit for the purposes of the said lessee, then, and so often as the same shall happen, the rent hereby reserved, or a proportionate part thereof according to the nature and extent of the injuries sustained, shall abate, and all or any remedies for recovery of said rent, or such proportionate part thereof, shall be suspended until the said premises shall have been rebuilt or made fit for the purposes of said lessee.

This proviso was added in 1895.

Rent payable in advance and destruction of property.

By the proviso in the lease in case of the mill demised being accidentally burned the rent was thenceforth to cease. The mill was so burned on the 5th March. The rent was payable in advance, and was due on the 1st of March. The tenant had to pay the rent although the premises were burned on the 5th: Ryerse v. Lyons, 22 U. C. R. 12.

(11) Proviso for re-entry by the said (lessor) on non-payment of rent or non-performance of covenants:

Provided always, and it is hereby expressly agreed, that if the rent hereby reserved, or any part thereof, shall be unpaid for fifteen days after any of the days on which the same ought to have been paid, although no formal demand shall have been made thereof, or in case of the breach or non-performance of any of the covenants or agreements herein contained, on the part of the lessee, his executors, administrators, or assigns, then, and in either of such

cases, it shall be lawful for the lessor at any time hereafter, into and upon the said demised premises, or any part thereof, in the name of the whole to re-enter, and the same to have again, re-possess and enjoy as of his or their former estate, anything hereinafter contained to the contrary notwithstanding.

(See chapter on Forfeiture and Re-entry.)

(See also text at head of this chapter.)

(12) The said lessor covenants with the said lessee for quiet enjoyment:

And the lessor doth hereby, for himself, his heirs, executors, administrators and assigns, covenant with the lessee, his executors, administrators and assigns, that he and they paying the rent hereby reserved, and performing the covenants hereinbefore on his and their part contained, shall and may peaceably possess and enjoy the said demised premises for the term hereby granted, without any interruption or disturbance from the lessor, his heirs, executors, administrators and assigns, or any other person or persons lawfully claiming by, from, or under him, them, or any of them.

Covenants for quiet enjoyment, though apparently directed to the protection of the tenant, really limit the liability of the landlord. For, if there were no such covenant in the lease, the law would imply one on the part of the landlord to protect the tenant from all disturbance in his holding by the landlord, or by those claiming under him, or by those claiming by title paramount to him (that is by an adverse and better title). But

as these covenants are usually framed, the landlord only engages to protect the tenant from being ejected either by himself or by those claiming under him.

Where plaintiff (lessee) was evicted by title paramount to lessor: Held, he could not recover. The above covenant is limited to acts of lessor and those claiming under him: Davis v. Pitchers, 24 C. P. 516. See Snarr v. Baldwin, 11 C. P. 353.

Defendant having executed a lease of certain premises to plaintiff, containing the ordinary statutory covenant for quiet enjoyment, plaintiff was subsequently ejected by the assignee of mortgages thereon created prior to the lease, and thereupon sued defendant for breach of the covenant; but, held, that he could not recover as the assignee of the mortgages was not a person claiming "by, from or under" the defendant, but under the defendant's predecessor in title; held, also, that the fact that defendant had taken the land subject to the mortgages and was to pay them off, did not extend her liability under the covenant: Bellamy v. Barnes, 44 U. C. R. 315.

The following are the statutory directions for the use of the above short forms. The first column covenants are in large type above the second column in small type:

1. Parties who use any of the forms in the first column of this schedule may substitute for the words "lessee" or "lessor" any name or names (or other designation), and in every such case corresponding substitutions shall be taken to be made in the corresponding forms in the second column.

2. Such parties may substitute the feminine gender for the masculine, or plural number for the singular, in the forms in the first column of this schedule, and corresponding changes shall be taken to be made in the corresponding forms in the second column.

3. Such parties may introduce into or annex to any of the forms in the first column any express exceptions from, or express qualifications thereof, respectively; and the like exceptions or qualifications shall be taken to be made from or in the corresponding forms in the second column.

4. Where the premises demised are of freehold tenure, the covenants 1 to 8 shall be taken to be made with, and the proviso 9 to apply to, the heirs and assigns of the lessor; and where the premises demised are of leasehold tenure, the covenants and proviso shall be taken to be made with, and apply to, the lessor, his executors, administrators and assigns.

5. Unless the contrary is expressly stated in the lease, in all leases made after 25th day of March, 1886, the extended form of covenant numbered 7 shall be read as containing after the word "lessee," in the first line thereof, the words "his executors, administrators and assigns."

CHAPTER VI.

COVENANTS NOT IN THE STATUTORY SHORT FORM OFTEN USED.

Covenant to keep insured.

82. Leases frequently contain covenants on the part of the lessee to keep the premises insured; the name of the office in which the insurance is to be effected and the amount of the policy being also generally stated. Questions on these covenants very often arise in practice, and it may, therefore, be well for the tenant to bear in mind some of the most important points decided in relation to his liabilities. When a lessee has covenanted to insure and keep premises insured, it will be a breach of the covenant to allow them to remain uninsured for ever so short a period, and that, too, although no fire occur or damage be done to the premises in the meantime. It will also be a breach of covenant to insure in the name of the tenant only, when the lease stipulates that the policy shall be in the joint names of the landlord and tenant. And as the breach of this covenant continues so long as a state of things exists inconsistent with the provisions of the lease, any sanction, express or implied (as by receipt of rent), which the landlord may give

to a departure from the letter of the covenant, will only apply to what is past. But these matters may be condoned by the Court under section 26 of the Judicature Act, hereafter quoted.

83. In a Canadian Act passed in 1865 the following sections were included (8, 9, 10):

Lessor to have benefit of an informal insurance.

The person entitled to the benefit of a covenant on the part of a lessee or mortgagor to insure against loss or damage by fire shall, on loss or damage by fire happening, have the same advantage from the then subsisting insurance relative to the building or other property covenanted to be insured, effected by the lessee or mortgagor in respect of his interest under the lease or in the property, or by any person claiming under him, but not effected in conformity with the covenant, as he would have from an insurance effected in conformity with the covenant.

Protection of purchaser against forfeiture under covenant for insurance against fire in certain cases.

Where on a bona fide purchase, after the passing of this Act, of a leasehold interest containing a covenant on the part of the lessee to insure against loss or damage by fire, the purchaser is furnished with the written receipt of the person entitled to receive the rent, or his agent, for the last payment of the rent accrued due before the completion of the purchase, and there is subsisting at the time of the completion of the purchase an insurance in conformity with the covenant, the purchaser, or any person claiming under him, shall not be subject to any liability by way of forfeiture or damage, or otherwise, in respect of any breach of the covenant committed at any time before the completion of the purchase, of which the purchaser had not notice before the completion of the purchase; but this provision is not to take away any remedy which the

lessor or his legal representatives may have against the lessee or his legal representatives for breach of covenant.

To what leases the preceding provisions shall apply.

The preceding sections shall be applicable to leases for a term of years, absolute or determinable on a life or lives, or otherwise, and also to a lease for the life of the lessee, or the life or lives of any other person or persons.

Mortgagee may require insurance money.

84. These sections were included in the Landlord and Tenant Act in the revision of 1877. They were repealed by 49 Vict. c. 20, s. 16 (9). The first one was considered of not much value, because the Imperial statute, 14 Geo. III. c. 78, s. 83 (which provided that insurance money might be applied in rebuilding on request of any party interested or on suspicion of arson), was declared to be in force in Ontario. This Imperial statute was repealed by 50 Vict. c. 26, s. 154, and there is no similar section in any of our Ontario Acts providing for the case of lessees, although there is for mortgagees. The only section covering the point which it will be seen does not extend as widely as the one quoted, is section 4 of the Act respecting Mortgages (R. S. O. c. 102). It is as follows:

All money payable on an insurance to a mortgagor shall, if the mortgagee so requires, be applied by the mortgagor in making good the loss or damage in respect of which the money is received.

(2) Without prejudice to any obligation to the contrary imposed by law or by special contract, a

mortgagee may require that all money received on an insurance be applied in or towards the discharge of the money due under his mortgage.

85. The term "mortgagor" includes any person from time to time deriving title under the original mortgagor, or entitled to redeem a mortgage according to his estate, interest or right in the mortgaged premises. It, therefore, includes a tenant, because a tenant is entitled to redeem a mortgage. If, therefore, there is an insurance on the premises effected by the tenant, loss payable to the landlord, and there is a mortgage on the premises, the holder of the mortgage can call on the tenant under this section to expend the money in making good the loss or paying it on the mortgage.

Unqualified covenant and fire.

86. Suppose there is, on the part of the tenant, an unqualified covenant to pay rent, so that if the premises were destroyed by fire the liability for rent would continue, and also an insurance effected by the landlord. The latter could not insist on his tenant continuing to pay rent and refuse to expend the insurance money in repairing the premises. The insurance money would represent the property. It will be seen that the Act above quoted refers only to insurance where there is a mortgage on the premises. Dealings between landlord and tenant relating to insurance are not provided for by the Act.

87. Section 8, above quoted, is probably provided for by the next quoted section of the Judicature Act, but section 8 is a positive remedial clause, while the section of the Judicature Act is optional.

88. Section 26 of the Judicature Act (Ontario Acts, 1895, c. 12) is as follows: Relief against forfeiture for breach of covenant to insure in certain cases.

The High Court shall have power to relieve against a forfeiture for breach of a covenant or condition in any lease to insure against loss or damage by fire where no loss or damage by fire has happened, and the breach has, in the opinion of the Court, been committed through accident or mistake, or otherwise, without fraud or gross negligence, and there is an insurance on foot at the time of the application to the Court in conformity with the covenant to insure, upon such terms as to the Court may seem fit.

89. Where the landlord covenanted to insure, and the tenant had the option to purchase, and before the time for exercising the option expired the demised premises were burned, the landlord receiving the insurance money, it was held that the tenant, on exercising the option, could not sustain a claim to the insurance money as part of his purchase. Tenant's right to bring action.

90. A covenant not to carry on certain specified trades and businesses, or any obnoxious or offensive trades and businesses gener- Covenant not to carry on

business that may be considered a nuisance.

ally, is very common in leases of the better description of house property. As to the trades enumerated, no difficulty can, of course, arise; but in construing the general words "any offensive trade or business," the Courts will look to the character of the locality. The landlord does not waive his right to forfeit a lease for the breach of such a covenant by accepting rent for however long a time, unless, indeed, he allow the lessee to spend money on the improvement of the premises in the faith that his lease is subsisting and perfectly valid.

Covenants for renewal.

91. Covenants for renewal of leases are considered as real agreements and run with the land, and therefore will affect even the legal interest of those who take the estate with notice of such leases and covenants. A covenant for perpetual renewal entered into by a person having a limited interest in lands does not bind the estate.

Perpetual renewals not encouraged.

92. The leaning of the Courts is against perpetual renewals; and, therefore, in order to establish this construction the intention must be unequivocally expressed. A proviso in general terms that the lease to be granted shall contain the same covenants and agreements as the lease containing the covenant, has been repeatedly held not to extend to the covenant for renewal.

Specific covenant.

93. But, where a lease contained a covenant to execute a renewed lease at the same rent, and subject to the same covenants, "including this present covenant," it was held that this was a covenant for perpetual renewal, and that the lessee was entitled to have inserted in the renewed lease a covenant for renewal in the same words as that in the original lease.

No perpetual renewal through equivocal acts.

94. Any construing of a covenant for renewal as a perpetual one by equivocal acts of the parties will not now be allowed.

One of two no right.

95. One of two lessees has no single right of renewal.

Forfeiture of right to renew.

96. The right to renew may be forfeited by not applying for renewal in time. It may also be forfeited by non-performance of covenants. If the covenant to renew is to be acted upon "in case the lessee's covenants are duly performed," it is construed strictly against the lessee, and will not be specifically performed if the lessor have a right of action for the breach of covenant to repair, although the repair be but small. If there are any repairs wanted at all the lessee should have them done before applying for the renewal.

Executor renewing.

97. A lease renewed by an executor or trustee in his own name, even in the absence

of fraud, and upon the refusal of the lessor to grant a new lease to the cestui que trust, will be ordered to be held in trust for the person entitled to the old lease.

Partner renewing.

98. A partner renewing a lease of the partnership premises in his own name will be held a trustee of it for the firm.

Sub-leases.

99. In case of sub-leases by 4 Geo. II. c. 28, s. 6, where there are parcels leased out to several sub-tenants, it is not necessary on a renewal for all the sub-tenants to surrender. A new lease may be made without any surrender by them.

Right to purchase reversion.

100. A lease sometimes contains a clause enabling the tenant, upon giving certain notice to the landlord, to purchase the reversion. Such a clause is always for the interest of the tenant, and binds him to nothing, and allows a trial of the demised premises.

Referring of differences.

101. Leases frequently provide for the referring of differences as to the amount to be paid for improvements, etc., and in farm leases for crops, to two persons, one chosen by the landlord, the other by the tenant. If these persons are arbitrators, the submission can be made a rule of Court. If they are valuers, to decide by the use of their own eyes, skill and knowledge, it is otherwise. Whether

they are valuers or arbitrators depends on the language used.

102. We now come to covenants which, under present legislation, are always to be implied (R. S. O. c. 100, s. 17): Covenants to be implied.

(1) In a conveyance made on or after the 1st day of July, 1886, there shall, in the several cases in this section mentioned, be deemed to be included, and there shall in those several cases be implied covenants to the effect in this section stated by the person, or by each person who conveys, as far as regards the subject matter, or share of subject matter, expressed to be conveyed by him with the person, if one to whom the conveyance is made or with the person, jointly if more than one, to whom the conveyance is made as joint tenants, or with each of the persons, if more than one, to whom the conveyance is made as tenants in common, that is to say: On conveyance for value by beneficial owner.

(*a*) In a conveyance for valuable consideration, other than a mortgage, the following covenants by the person who conveys, and is expressed to convey as beneficial owner (namely):

Covenants for right to convey;

Quiet enjoyment;

Freedom from incumbrances; and

Further assurance;

According to the tenor and effect of the several and respective forms of covenants for the said purposes set forth in Schedule B to the Act respecting Short Forms of Conveyances, and therein numbered 2, 3, 4, and 5, respectively, subject to the directions in the said schedule contained.

On conveyance of leasehold for value by beneficial owner.

(*b*) In a conveyance of leasehold property for valuable consideration, other than a mortgage, the following further covenant by the person who conveys, and is expressed to convey as beneficial owner (namely):

Validity of lease.

That, notwithstanding anything by the person who so conveys, made, done, executed or omitted, or knowingly suffered, the lease or grant creating the term or estate for which the land is conveyed is at the time of conveyance a good, valid, and effectual lease or grant of the property conveyed, and is in full force, unforfeited, unsurrendered, and in nowise become void or voidable, and that notwithstanding anything as aforesaid all the rents reserved by, and all the covenants, conditions, and agreements contained in the lease or grant, and on the part of the lessee or grantee and the persons deriving title under him, to be paid, observed, and performed, have been paid, observed, and performed up to the time of conveyance.

On conveyance to trustee.

(*c*) In a conveyance the following covenant by every person who conveys, and is expressed to convey, as trustee or mortgagee, or as personal representative of a deceased person, or as committee of a lunatic, so found by inquisition or judicial declaration, or under an order of the Court, which covenant shall be deemed to extend to every such person's own acts only (namely):

Against incumbrances.

That the person so conveying has not executed or done, or knowingly suffered, or been party or privy to any deed or thing whereby, or by means whereof, the subject matter of the conveyance, or any part thereof, is or may be impeached, charged, affected, or incumbered in title, estate, or otherwise, or whereby, or by means whereof, the person who so conveys is in anywise hindered from conveying the subject matter of the conveyance, or any part thereof, in the manner in which it is expressed to be conveyed.

(2) Where in a conveyance it is expressed that by direction of a person expressed to direct as beneficial owner another person conveys, then the person giving the direction, whether he conveys and is expressed to convey as beneficial owner or not, shall be deemed to convey, and to be expressed to convey as beneficial owner, the subject matter so conveyed by his direction, and a covenant on his part shall be implied accordingly. On conveyance by beneficial owner.

(3) Where in a conveyance a person conveying is not expressed to convey as beneficial owner, or as settlor, or as trustee, or as mortgagee, or as personal representative of a deceased person, or as committee of a lunatic, so found by inquisition, or under an order of the Court, or by direction of a person as beneficial owner, no covenant on the part of the person conveying shall be by virtue of this section implied in the conveyance. Where covenants are not implied.

(4) The benefit of a covenant implied as aforesaid shall be annexed and incident to, and shall go with the estate or interest of the implied covenantee, and shall be capable of being enforced by every person in whom that estate or interest is for the whole, or any part thereof, from time to time vested. Enforcing covenants.

(5) A covenant implied as aforesaid may be varied or extended by deed, and as so varied or extended shall, as far as may be, operate in the like manner and with all the like incidents, effects and consequences, as if such variations or extensions were directed in this section to be implied. Variation of covenants.

The application of above section to the subject of this volume lies in paragraph (*b*) of the first subsection. The reader will observe that in this subsection the word "further" is used. This word shows that the covenants already mentioned in subsec-

tion (*a*) are to be added to that mentioned in subsection (*b*). The transaction referred to is "a conveyance of leasehold property for valuable consideration"—what is equivalent to a transfer by a lessee of his interest, or by a lessor of his reversion.

CASES.

Covenant to insure, extent of.

Covenant by lessee to insure in the name of the lessor, the insurance money to be expended in the erection of new buildings: Held, a covenant running with the land, and that an action would lie on it against the assignee of the lessee:

Douglass v. *Murphy*, 16 U. C. R. 113.

Covenant to pay for buildings not made wide enough.

A covenant by a lessor (not mentioning assigns) to pay for buildings to be erected on the lands demised, does not run with the land, and the lessee or his assigns have no claim as against the land or the devisees of the lessor in respect of the value of buildings so erected:

McClary v. *Jackson*, 13 O. R. 310.

Carrying on trading affecting the insurance.

A lessor demised property for a term of years, with a stipulation that the lessee would not carry on any business that would affect the insurance. The lessee made an under-lease, omitting any such stipulation, and the under-lessee commenced the business of rectifying highwines. Injunction granted to restrain same:

Arnold v. *White*, 5 Chy. 371.

Liability for nuisances.

If a nuisance exist at the time of letting, both tenant and owner are liable. If it arise after the tenancy is created, the tenant only is responsible:

Reg. v. *Osler*, 32 U. C. R. 324.

Where the lessor covenants for a renewal of the term, or in default for payment of improvements, the option rests with the lessor, either to renew or pay for the improvements; and the lessee cannot compel specific performance of the contract to renew:

Lessor's option to renew or pay for improvements cannot be taken from him.

Hutchinson v. *Boulton*, 3 Chy. 391.

Where a lessee took a lease of premises for two years, and covenanted to leave the premises without notice at the end of that time: Held, that on ejectment brought by the lessor at the end of the term, the lessee could not set up a former lease to him for a longer period:

He had *covenanted* to leave.

Wimburn v. *Kent*, 5 O. S. 437.

CHAPTER VII.

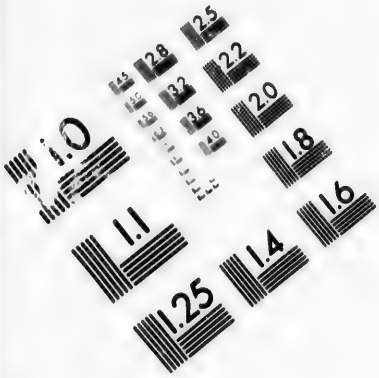
RENT.

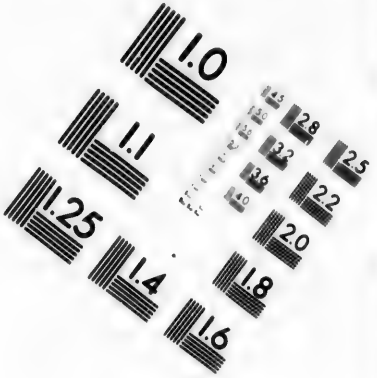
103. The word rent signifies a compensation or return, it being in the nature of an acknowledgment given for the possession of some corporeal inheritance. It is defined to be "a certain profit issuing yearly out of lands and tenements corporeal."

"Rent" defined.

104. It must be a profit; yet there is no occasion for it to be, as it usually is, a sum of money: for horses, wheat, or other matters, may be, and are frequently, rendered by way

Requisites.





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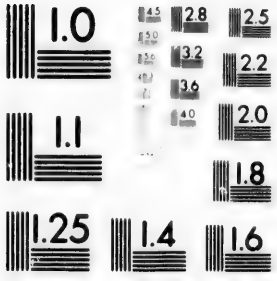

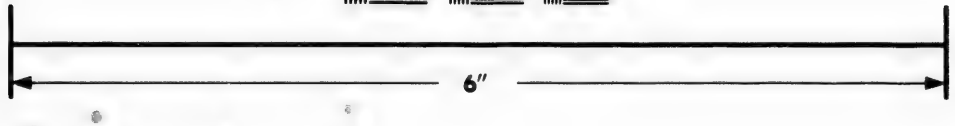

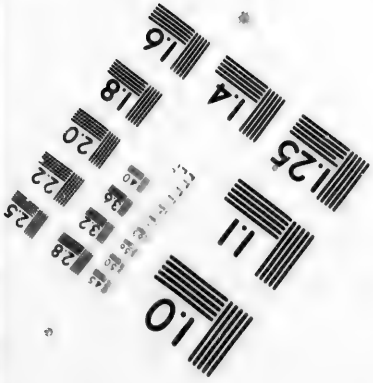

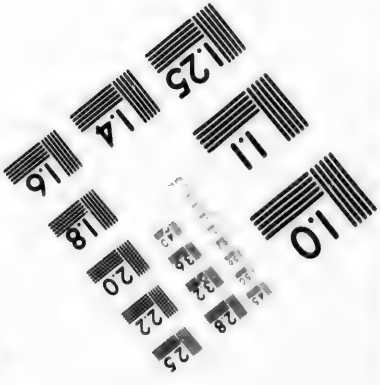

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of rent. It may also consist in services or manual operations, as to plough so many acres of land; which services in the eye of the law are profits.

105. This profit must also be certain; or that which may be reduced to a certainty by either party.

106. It must also issue yearly; though there is no occasion for it to issue every successive year; yet, as it has to be produced out of the profits of lands and tenements, as a recompense for being permitted to hold or enjoy them, it ought to be reserved yearly, because those profits do annually arise and are annually renewed.

107. It must issue out of the thing granted, and not be part of the land or thing itself; wherein it differs from an exception in the grant, which is always part of the thing granted.

108. It must, lastly, issue out of lands and tenements corporeal, that is, from some inheritance whereunto the owner or grantee of the rent may have recourse to distrain.

Kinds of rents.

109. There are at common law three manner of rents—rent-service, rent-charge and rent-seck. Rent-service is so called because

it has some corporal service incident to it, as by the service of ploughing the land and five shillings rent. This pecuniary rent being connected with personal services is, therefore, called rent-service. For such rent, in case it be behind or in arrear at the day appointed, the landlord may distrain of common right, without reserving any special power of distress; provided he has in himself the reversion, or future estate of the lands and tenements, after the lease or particular estate of the lessee or grantee is expired. Rent-service.

110. A rent-charge is where the owner of the land has no future interest or reversion expectant in the land; as, where a man by deed makes over to others his whole estate in fee simple, with certain rent payable thereout, and adds to the deed a covenant or clause of distress, that if the rent be in arrear or behind, it shall be lawful to distrain for the same. In this case the land is liable to the distress, not of common right, but by virtue of the clause in the deed; and therefore it is called a rent-charge, because in this manner the land is charged with a distress for the payment of it. Rent-charge.

111. Rent-seck (or barren rent) is in effect nothing more than a rent reserved or granted by deed, but without any clause of distress. Rent-seck.

Rack-rent.

112. Rack-rent is only a rent of the full value of the tenement, or near it.

No present difference.

113. These are the general divisions of rent; but the difference between them in respect to the remedy for recovering them is now totally abolished, and all persons may have the like remedy by distress for rents-seck as in case of rents reserved upon lease (4 Geo. II. c. 28).

Rent so much "per annum."

114. If a rent of so much "per annum," or an "annual rent" of so much, is reserved (nothing being said about the time or times of payment) it will be payable once a year, on the anniversary of the commencement of tenancy. But where a rent was reserved "after the rate of £18 per annum," this was held too indefinite, both as to amount and time of payment. It is usual to make the rent payable either quarterly or half-yearly on specified days.

Rent reserved to a stranger.

115. Rent must be reserved to the lessor himself, not to a third party. However, where there is a reservation to a stranger, either in a deed or written agreement, although the sum reserved is not a rent, properly so called, and cannot be distrained for, it may be recovered by an action on the contract.

Death of landlord.

116. After the death of the original landlord or lessor, the rent will be payable to his executors, or to his administrators, if letters of administration were issued to his estate.

Tenant must have possession.

117. Whatever covenants or provisions a lease or agreement may contain, the tenant incurs no liability to pay rent until he has been put into possession, or has been tendered and afforded the opportunity of taking possession of the demised premises.

Re-entry.

118. Should the lease, as is generally the case, contain a proviso enabling the landlord to re-enter and recover possession if the rent is not paid on a specified day, then on that day (according to the language of the proviso) the landlord must demand, or the tenant be prepared to tender, such rent on the premises before sunset. (See chapter X.)

Tender.

119. To make a tender good there must be actual production of the money due in gold, or in silver if the amount be under ten dollars (copper or bronze, twenty-five cents) or Dominion notes. There must also be an unconditional offer of it to the landlord or the bailiff making the distress. A creditor is not bound to accept a cheque, even a marked cheque, nor is he bound to accept bank notes of any bank. If he does not make objection at the time of the tender of these notes, and

refuse the money on that ground, and afterwards raises the defence, the Court, while giving effect to it, would probably deprive him of costs, but in law the tender would not be a good tender.

Tender, where to be made.

120. If there is in the lease a covenant for the payment of the rent at a fixed day, then, if no particular place for the payment is mentioned, it is the duty of the covenantor (the tenant) to seek out the person to whom the rent is to be paid, and † pay or tender it upon the appointed day. If this is not done the landlord may forthwith bring an action for the rent.

Payment, to whom to be made.

121. Where the rent is paid in cash the payment must be made in accordance with, and is subject to, the ordinary rules which prevail between debtor and creditor. It may be made either to the landlord or to his authorized agent. And if the landlord have once authorized the tenant to pay his agent, he cannot by any subsequent revocation of that authority invalidate any payment of rent made by the tenant to the agent before the former has notice of such revocation. A remittance by post would be a sufficient and conclusive payment, whether it came to the landlord's hands or not, if sanctioned expressly by the landlord in that particular in-

stance, or implied by the previous usage of the parties.

Payment by tenant of charges on land.

122. If a tenant, in order to protect himself, pay charges which are, in fact, due from his landlord, but which are fixed upon the premises he holds, and may be distrained for there, he can, in settling with his landlord, claim to have such payments taken as on account of and in deduction of his rent, and may decline to pay any rent until he is fully reimbursed. Amongst such payments are ground rents, rent due from the immediate to a superior landlord, when the tenant actually in possession is only an under-lessee. The tenant, however, must be careful to deduct or set off these payments against the next rent that becomes due after they are made.

Lease by life tenants.

123. It sometimes happens that a person who has a mere life estate in lands grants a lease for years. Such a lease determines upon the death of the lessor; but his executors are entitled to recover a portion of the annual rent reserved in proportion to the time which elapsed from the last payment of rent till his death. A similar apportionment is made when a lessee, for a term of years determinable on the falling in of lives, makes an under-lease for a term of years certain, which is still subsisting at the expiration of the lease on which it is dependent.

Apportionment of rent.

124. The following are the statutory rules which now regulate the apportionment of rent: Landlord and Tenant Act, R. S. O. c. 143, ss. 1 to 6:

1. Where the words following occur in the five following sections of this Act, they shall be construed in the manner hereinafter mentioned, unless a contrary intention appears:

(1) "Rent" shall include rent-service, rent-charge, and rent-seck, and all periodical payments or renderings in lieu of or in nature of rent.

(2) "Annuities." } Omitted (not necessary in
(3) "Dividends." } this work.)

2. All rents, annuities, dividends, and other periodical payments in the nature of income (whether reserved or made payable under an instrument in writing or otherwise), shall, like interest on money lent, be considered as accruing from day to day, and shall be apportionable in respect of time accordingly.

3. The apportioned part of such rent, annuity, dividend, or other payment, shall be payable or recoverable in the case of a continuing rent, annuity, or other such payment, when the entire portion of which such apportioned part forms part becomes due and payable, and not before; and in the case of a rent, annuity, or other such payment, determined by re-entry, death, or otherwise, when the next entire portion of the same would have been payable if the same had not so determined, and not before.

4. All persons and their respective heirs, executors, administrators and assigns, and also the executors administrators and assigns, respectively,

of persons whose interests determine with their own deaths, shall have such, or the same, remedies for recovering such apportioned parts as aforesaid, when payable (allowing proportionate parts of all just allowances), as they respectively would have had for recovering such entire portions as aforesaid, if entitled thereto respectively.

But persons liable to pay rent reserved out of or charged on lands or other hereditaments of any tenure, and the same lands or other hereditaments shall not be resorted to for any such apportioned part forming part of an entire or continuing rent, as aforesaid specifically, but the entire or continuing rent, including such apportioned part, shall be recovered and received by the heir or other person, who, if the rent had not been apportionable under this Act, or otherwise, would have been entitled to such entire or continuing rent, and such apportioned part shall be recoverable by action from such heir or other person by the executors or other persons entitled under this Act to the same.

5. Nothing in the preceding provisions of this Act contained shall render apportionable any annual sums made payable in policies of assurance of any description.

6. The preceding provisions of this Act shall not extend to any case in which it is expressly stipulated that no apportionment shall take place.

Destruction of premises.

125. A tenant from year to year, or a lessee who has covenanted without qualification to pay rent during his term, will not be relieved from liability if the house be wholly destroyed by fire. The same liability has been held to continue in the case of a

tenant from year to year of a second floor, occupied under a parol agreement. And the occupant of furnished lodgings let quarterly has been held liable to pay rent, at all events up to the time of the fire. Of course, a tenant from year to year may relieve himself by giving a proper notice to quit, but a lessee for a term certain with a general covenant must pay during the remainder of his term. Even if he have covenanted without any qualification to pay rent, and also have covenanted to repair, except in the case of the premises being burnt down, and the buildings are burned, this will make no difference. The landlord may refuse to rebuild, and the tenant ought to have protected himself by an express proviso in his lease, that in case of fire the landlord should rebuild or repair, and that until he did the rent should be suspended or abated.*

Assignment of interest of lessee.

126. Both a lessee under a lease under seal, containing the usual covenant on his part to pay rent, and a tenant from year to year under an agreement, may, in the absence of any stipulation to the contrary in such deed or agreement, assign their interests thereunder.

*See chapter on Covenants not in Short Form of Leases and Covenant No. (10), Short Form.

127. A tenant will remain liable for rent, unless at a time when he is entitled to do so he deliver up the complete possession of the premises; or (where there is no covenant), the landlord accept another in his stead; or, after the tenant has abandoned the premises, the landlord let them again. In the latter case, however, the former tenant will be liable for rent up to the time of such letting. When tenant's liability for rent ceases.

CASES.

Where demised property is sold by a prior mortgagee under power of sale, and the lease is thereby determined between two gale days, the rent is apportionable, and the tenant is liable to pay rent up to the day of such determination: Apportionment of rent.

Kinnear v. *Aspden*, 18 A. R. 468.

Rent may be attached, and when it is attached the legal result is that the collateral remedy of the landlord, the judgment debtor by way of distress, is suspended; and by virtue of R. S. O. c. 143, ss. 2 to 6, a part of such rent may be attached as it accrues de die in diem, though not actually payable till the next gale day: Rent.

Patterson v. *King*, 16 C. L. T. 7.

Defendant leased to the plaintiff for three years from the 1st of May; and the plaintiff covenanted that on or before said 1st of May he would give to defendant two sufficient securities for the performance of his covenants in the lease. Held, that the giving such security was a condition precedent to the plaintiff's right of possession under the lease: Sureties for payment of rent required

Murphy v. *Scarth*, 16 U. C. R. 48.

In an action of covenant between the original parties to the deed, an eviction from part of the premises is a good defence to the action. There can be no apportionment of the rent as in debt:

Shuttleworth v. *Shaw*, 6 U. C. R. 539.

If there is an adverse holding of part of the premises, and plaintiff is excluded therefrom, no legal term is created by the instrument of lease between the parties, and no right to any rent from such part accrues, and the rent cannot be apportioned because the tenant (the plaintiff) had never been subject to the entire rent by virtue of this demise:

Kelly v. *Irwin*, 17 C. P. 351.

When doctors differ, who shall decide?

This case was not followed in *Holland* v. *Vanstone*, 27 U. C. R. 15, which case was as follows: Defendant leased to the plaintiff by deed for three years, there being another tenant in possession of part as a monthly tenant, who was succeeded by two others holding under defendant: Held, that the lease to the plaintiff, being under seal, operated as a grant of the reversion (with the rent incident thereto) as to the part thus held, and that defendant, therefore, was entitled to distrain for the whole rent in arrear.

Terms of continuing tenancy.

Where a party, who has held over for a term at a certain rent, continues to occupy after the expiration of his term, it is presumed, if there is no evidence to the contrary, that he holds at the former rent:

Hilliard v. *Gemmell*, 10 O. R. 504.

Rent is a "tenement."

Rent issuing out of land is a tenement; it partakes of the nature of land:

Hopkins v. *Hopkins*, 3 O. R. 223.

Rent to accrue due is not a chose in action, and a tenant in respect to it may attorn:

Harris v. *Meyers*, 2 Chy. Ch. 121.

Rent to accrue due is not a chose in action.

The assignee of a reversion cannot recover rent accrued due before the assignment:

Whittrock v. *Hallinan*, 13 U. C. R. 135.

Rights of assignee of reversion.

No occupation rent should be charged against one who has been in occupation of land under mistake of title, in respect of the increased value thereof arising from improvements which are not allowed him:

McGregor v. *McGregor*, 5 O. R. 617.

Mistake of title.

Where the landlord had covenanted to allow the tenant all reasonable improvements made by him in the amount of his rent: Held, that the tenant could deduct the value of the improvements from the rent due:

Wilcoxson v. *Palmer*, T. T. 3 & 4 Vict.

Tenant may, if so stipulated, take out improvements from his rent.

A tenant may by parol bind himself to pay rent in advance:

Galbraith v. *Fortune*, 10 C. P. 109.

Rent in advance.

A tenant in common, being in actual occupation of the joint estate, is not chargeable with rent. It would be otherwise if he had been in the actual receipt of rent from third parties:

Rice v. *George*, 20 Chy. 221.

Tenant in common, how far liable for rent.

CHAPTER VIII.

TAXES.

General principle.

128. All taxes charged upon, or with reference to real property, are in the first instance payable by the occupier of land or houses. Any taxes the tenant is wrongfully called upon to pay he may deduct from his rent, and thus throw them ultimately upon the landlord. The short form of lease, as will have been already noticed, contains a covenant relating to the liability for taxes as between landlord and tenant, but it is necessary to consider the law where there are no covenants or express stipulations on this point, as is generally the case where the tenancy is one from year to year.*

* 1892. Consolidated Assessment Act, sec. 24, p. 576: Any occupant may deduct from his rent any taxes paid by him, if the same could also have been recovered from the owner or previous occupant, unless there is a special agreement between the occupant and the owner to the contrary.

1892. Consolidated Municipal Act, sec. 569, subsec. 3 (c): Any agreement on the part of any tenant to pay the rates or taxes of the demised property shall not apply to or include the charges or assessments for any works under this section, unless such agreement in express terms mentions or refers to such charges or assessments, and as payable in respect of drainage works; but in cases of contracts of purchase, or of leases giving the lessee a right of purchase, the said charges or assessments shall be added to the price, and shall be paid (as the case may be) by the purchaser or by the lessee, in case he exercises such right of purchase.

Mode of assessment of real property.

129. There are two kinds of taxes* which are chargeable on land under the law relating to assessment and taxes in Ontario : (1) taxation for ordinary municipal and school purposes; (2) special rates for local improvements. These latter include drainage improvements.

Mode of collection of rates.

130. The provisions of the Assessment Act relating to collection of rates are as follows:

Collector's roll.

(1) The clerk of every local municipality makes a collector's roll containing columns for all the information required by that Act, to be entered by the collectors therein. These rolls must include all rates which are chargeable on the municipality, whether special rates, local rates, public school rates, separate school rates or special rates for school debts, as the case may be. Any provincial taxes authorized by the Provincial Legislature are assessed, levied and collected in the same way as local rates, and are similarly calculated upon the finally revised assessments, and are also entered in the collector's roll. Non-resident landlords are also included in this roll. When completed the clerk of the municipality hands the rolls to the collectors.

Collector's duty.

(2) Collectors upon receiving their collection rolls must proceed to collect taxes

* Where lease contained no provision as to the taxes : Held, that the landlord should pay them : *Dove* v. *Dove*, 18 C. P. 424.

therein mentioned. In cities and towns a collector must call at least once upon the person taxed, or at his usual residence or place of business, if within the municipality, and must demand payment of the taxes payable by that person. Or, he shall leave, or cause to be left, with the person taxed, or at his residence or place of business, or on the premises in respect of which the taxes are payable, a written notice specifying the amount, and must, at the time of that demand or notice, enter the date on his collection roll opposite the name of the person taxed. In places other than cities or towns he must call at least once on the person taxed, or at the place of his usual residence or place of business, if within the local municipality, and must demand payment of the taxes payable by that person. If empowered by the by-law of the municipality he must leave with the person taxed, or at his residence or place of business, a notice specifying the amount claimed, and must enter the date of so doing opposite the name of the person in the collection roll. The notice must have a schedule specifying the different rates and the amount on the dollar to be levied for each rate making up the taxes.

Levy for taxes.

(3) If a person neglects to pay his taxes for fourteen days after this demand, or after notice served pursuant to municipal by-law

as above mentioned, or in the case of cities and towns, after a demand or notice as above mentioned, the collector may by himself or his agent levy the taxes with costs by distress of the goods and chattels of the person who ought to pay them on all goods or chattels in his possession, wherever the same may be found within the county in which the local municipality lies. The costs chargeable are those payable to bailiffs under the Division Courts Act.

(4) There are the same exemptions as in the case of landlord and tenant. (See chapter on Distress.) Exemptions.

(5) The goods and chattels of the owner are liable to distress for taxes whether the owner is assessed in respect of the premises or not. Provided that no goods which are in the possession of the person liable to pay the taxes for the purpose only of storing or warehousing them, or of selling them upon commission, or as agent, can be levied upon or sold for taxes. Provided also, that goods in the hands of an assignee for the benefit of creditors, or in the hands of a liquidator under a winding-up order, are liable only for the taxes of the assignor or of the company being wound up, and the taxes upon the premises in which the goods were at the time of the assignment or winding-up order, and there- Goods of owner liable.

after while the assignee or liquidator occupies the premises or the goods remain thereon.

Persons assessed not in possession.

(6) In cases of distress for the non-payment of taxes, where the owner or person assessed is not in possession, the goods and chattels on the premises not belonging to the person liable for the taxes shall not be subject to seizure; but this restriction shall not apply in favour of—

A person claiming title under or by virtue of an execution against the person so liable;

Or in favour of any person whose title is derived by purchase, gift, transfer or assignment from the person so liable, whether absolute or in trust, or by way of mortgage or otherwise;

Nor to the interest of the person so liable in any goods on the premises belonging to him, or to the possession of which he is entitled, under a contract for purchase, or by which he may or is to become the owner thereof upon performance of any condition;

Nor where goods have been exchanged between two persons so liable by the one borrowing or hiring from the other, for the purpose of defeating the claim of or the right of distress for the non-payment of taxes;

Nor shall the restriction apply where the property is claimed by the wife, husband, daughter, son, daughter-in-law or son-in-law of the person so liable, or by any other relative of his, in case such relative lives on the premises as a member of the family; and possession by the tenant of said goods and chattels shall be sufficient prima facie evidence that they belong to him.

Removal of goods apprehended.

(7) If, at any time after demand or notice as above described, and before the expiry of the time for payment of taxes, the collector has good reason to believe that any party by whom taxes are payable is about to remove his goods and chattels out of the municipality before that time has expired, a warrant may be issued to the collector by the head of the municipality or any justice of the peace authorizing the collector to levy for the taxes and costs, although the time for payment may not have expired. To obtain this warrant the collector must make an affidavit.

Non-residents.

(8) Non-residents receive notice by post of the amount of taxes claimed against their property, and entries are made of the transmission of such notices on the collectors' rolls. In the case of non-residents the collector, if the taxes are not paid after fourteen

days from the time of the transmission of the demand, may make distress of any goods and chattels which he may find on the land in the same manner, and subject to the same limitations, as in the case of taxes on resident lands.

Procedure by collector for distress.

(9) When distraining for taxes the collector must, by advertisement posted up in at least three public places in the township, village or ward wherein the sale of the distrained goods is to be made, give at least six days' public notice of the sale, and the name of the person whose property is to be sold. At the time named in the notice the collector sells the goods, or so much as may be necessary. If the property distrained is sold for more than the amount of the taxes and costs, and if no claim to the surplus is made by any other person on the ground that the property sold belonged to him, or that he was otherwise entitled to the surplus, such surplus is returned to the person in whose possession the property was when the distress was made. If a claim is made, and the claim is admitted, the surplus is paid to the claimant. If the claim is contested the surplus is paid to the treasurer of the municipality, who retains it until the parties have determined their rights.

Taxes recoverable as a debt.

(10) If taxes cannot be recovered in the above manner, they may be recovered with

interest and costs as a debt due to the municipality.

(11) Where taxes are due upon any premises occupied by a tenant, who is not liable to pay them, the collector may give the tenant notice in writing requiring him to pay the rent on such premises, as it from time to time becomes due, to such collector to the amount of the taxes unpaid and costs. The collector has the same authority to collect rent by distress or otherwise for the amount of these unpaid taxes and costs as the landlord of the premises would have. This right of collecting rent and applying it to taxes does not interfere with the other rights of the municipality to collect after applying any payments so received. Collector may require payment of rent to him.

(12) Taxes accruing on any land form a special lien on the land, and have preference over any claim, lien, privilege or incumbrance of any party except the Crown, and this preference does not require registration to preserve it. Taxes lien on land.

131. Lands may be sold for taxes when the taxes have been in arrear for three years. After sale the owner may redeem them if he tenders the amount of taxes, with interest at 10 per cent., at any time within a year. A tax sale is not liable to question after two Sale for taxes.

years. A tax deed must be registered within eighteen months after the sale.

Arrears of taxes.

132. A point of considerable interest in reference to taxes is as to the responsibility of an incoming tenant for taxes, which should have been discharged by the previous tenant, but which are left unpaid at the time of his entrance. Arrears of taxes are like ground-rent, or rent due to a superior landlord, recoverable by distress upon the premises whoever may be in occupation. Before a furnished house, therefore, is taken from a previous tenant, it is advisable to ask him for the last receipts for taxes, and if it appears that there are any arrears, it should be seen that they are paid before the agreement is signed or possession taken. If the landlord is letting the house, the person who proposes to become the tenant should satisfy himself by enquiry at the collector's whether all taxes have been duly paid, or should require the landlord to indemnify him against arrears.

CASES.

The provision of the Assessment Act (R. S. O. c. 193), requiring a demand for municipal taxes to be made fourteen days prior to distress, is satisfied by a demand made for the first instalment.

Tenant's right to bring action.

The occupant of the premises assessed is not limited to the remedy given him by section 24 of the Act, viz., to deduct from his rent any taxes paid by him, but may bring an action against his landlord

to recover damages sustained by reason of a distress for taxes upon the premises. Such damages are restricted to the amount of taxes paid to remove such distress, and do not include consequential damages.

Such distress is not a breach of the covenant for quiet enjoyment in a short form lease, for in distraining the municipality is not claiming from or under the landlord.

Smith v. *Franklin*, 12 C. L. T. 414.

An unlimited covenant to pay rent.

The section of the Assessment Act which, in the absence of an agreement to the contrary, authorizes the tenant to deduct from the rent the taxes paid by him, only does so when he could be compelled to pay the same:

Carson v. *Veitch*, 9 O. R. 706.

Tenant liable for taxes by reason of full wording of his covenant.

A tenant who covenants to pay rent without any deduction therefrom for or by reason of any matter or thing whatsoever, cannot claim a deduction for the amount of taxes paid by him for the house and premises demised:

Grantham v. *Elliott*, 6 O. S. 192.

Be careful how you pay another man's taxes.

A tenant occupied a house for some six years, during which period he paid his landlord's taxes: Held, that he could not deduct from the last quarter's rent the taxes paid, although there was no agreement as to payment of taxes between him and his landlord:

Wade v. *Thompson*, 8 L. J. 22.

Compare also to same effect *McAnany* v. *Tickell*, 23 U. C. R. 499.

Covenant to pay taxes, meaning of.

The words "all rates, etc., which now are," refer to the kind or character of the tax assessable against the land, and the words "or which shall at any time," etc., to any other kind of taxes which might thereafter be imposed:

Naughton v. *Wigg*, 35 U. C. R. 111.

These words do not refer to arrears of taxes or taxes due for the year in which the lease is made before its date:

See *Heyden* v. *Castle*, 15 O. R. 257, *contra*.

Payment of taxes not an acknowledgment of title.

A tenant agreed to pay for certain premises $6 a month and taxes, and for some eighteen years remained in possession, paying the taxes and nothing else. The tenant, after the expiration of this period, gave to his landlord an acknowledgment of indebtedness for rent for the whole period. Held, that the payment of taxes was not a payment of rent within the meaning of the Real Property Limitation Act, and that the tenant, although he had always intended to hold merely as tenant, had acquired title by possession, and could not make himself liable as for rent accruing after he had so acquired possession, by giving to the landlord an acknowledgment of indebtedness in respect of rent:

Finch v. *Gilray*, 16 A. R. 484, followed in *Coffin* v. *N. A. Land Co.*, 21 O. R. 80.

Extent of covenant to pay taxes.

Under this covenant (No. 2 Short Form) defendant held liable for local improvement taxes, and for the additions made under the Assessment Act year by year, to the amount of taxes in arrear or additions made by the municipality:

Boulton v. *Blake*, 12 O. R. 552.

Tax purchaser.

A tax purchaser could not hold a tax title against his lessors and the plaintiff (a mortgagee), the les-

sees being liable under their covenant to pay the taxes for which the land was sold:

Heyden v. *Castle*, 15 O. R. 257.

An ordinary lease under the Act, containing the words and "to pay taxes," covers a special rate created by a corporation by-law, as well as all other taxes: Tenant must pay special rates.

In re Michie and Toronto, 11 C. P. 379.
See on subject of Taxes, *Janes* v. *O'Keefe*, 26 O. R. 489.

CHAPTER IX.

DISTRESS.

133. Distress, so far as we are concerned with it, is the taking by the landlord without any process in Court personal chattels found upon the demised premises for the purpose of obtaining payment of rent due to him and in arrear. "Distress" defined.

134. No more than six years' arrears of rent are recoverable by distress. The six years count from whichever is latest, the last payment of rent or the time when the tenant gave a written acknowledgment of previous rent being due. Distress may now be made for all kinds of rent. It may even Six years' arrears recoverable.

be levied for the rent of furnished apartments, upon such goods and chattels of the tenant as may be found there.

Effect of taking security.

135. A bond, bill of exchange or promissory note given by a tenant, and accepted by a landlord on account of rent, will not suspend the right of the landlord to distrain, unless he obtain judgment upon such instrument. In that case he loses his right to distrain for so much of the rent as he takes judgment for. Hence, although a landlord may take a security by deed or bill or promissory note payable at six months' date, that will not interfere with his right to distrain next day if he chooses.

Tender, when it prevents costs.

136. If, when the landlord or his bailiff goes to distrain, the tenant pays or tenders the arrears, it must be accepted without costs. If, at any subsequent part of the proceedings before impounding, the tenant tenders the rent with the costs incurred up to that time, he will be entitled to an action against the landlord should the latter choose to proceed with the distress.

Bailiff may receive rent.

137. A warrant of distress confers upon the bailiff an authority to receive the rent, and even if the landlord has expressly forbidden him to do so, this would not deprive the tenant of the benefit of the tender to the bailiff.

Set-off.

138. The fact of a tenant having a debt due to him from his landlord to an equal or greater amount than his rent, will not prevent the latter distraining.*

Requisites to enable a distress to be made.

139. No distress can be made unless there is an actual demise or letting at a fixed rent. If, for instance, the tenant has entered into possession under a mere agreement for a lease, and continues to occupy without having ever paid any rent, or made any admission of a specific sum being due as rent in respect of such occupation, the landlord has no right to distrain, but so soon as, by payment of rent or by such an admission, a tenancy from year to year can be implied, the landlord may distrain for all rent subsequently coming due.

Rent accruing subsequently to notice to quit.

140. Where a landlord has given a notice to quit, and the tenant holds on after its expiration, the landlord cannot distrain for rent subsequently accruing due, unless something

*Section 29 of the Landlord and Tenant Act provides as follows: A tenant may set-off against the rent due a debt due to him by the landlord. The set-off may be by a notice as follows, and may be given before or after the seizure. "Take notice that I wish to set-off against rent due by me to you the debt which you owe to me (stating nature and amount of claim)." Sign the notice, date it and keep a copy of it, and have proof of its delivery ready. In case of such a notice the landlord is entitled to distrain only for the balance of the rent after deducting any debt justly due by him to the tenant. (R. S. O. c. 143, sec. 29).

has been done to show that a new tenancy has been created, e.g., payment and receipt of rent.

Landlord must own reversion.

141. In order that a landlord should without expressed agreement have the right to distrain, he formerly had to be the owner of the immediate reversion in the land—that is, he must be entitled to the land when the tenant's interest has been determined either by the expiration of his term or by notice to quit, but a reversion, however short, is sufficient for this purpose.

142. If a lessor parted with his reversion, though the rent was due before, he could not distrain, for the privity of estate was gone. He might, however, sue for the rent on the covenant to pay, if there was one.

Relation of landlord and tenant does not depend now on tenure.

143. Section 30 of chapter 42 of the Ontario Acts of 1896 now places the right to distrain on the following basis:

"The relation of landlord and tenant is not hereafter to depend on tenure, and a reversion or remainder in the lessor shall not be necessary in order to create the relation of landlord and tenant; or to make applicable the incidents by law belonging to that relation, nor shall any agreement between the parties be necessary to give to a landlord the right of distress."

Effect of sec. 30 Act of 1896.

144. This section does not deprive the landlord of his common law right to distrain.

It extends it to any case where there is an agreement on the one part to lease, and on the other to pay rent. As to the point of tenure, the rule was that the distrainor must have in himself the reversion to warrant a distress. It was argued on a similar statute of 1895 (repealed by the one of 1896 above quoted) that the relation of landlord and tenant was before the passing of the Act of 1895 feudal in its nature, and rested upon the fact that the tenant held the land of or from his landlord; the right of distress is incident to the reversion, and by reason of the change made by that Act no tenure existed between the parties as between reversioner and tenant, but the relation of landlord and tenant was thereafter to be one of contract. If, therefore, a landlord wished to have a right to distrain he must stipulate for it specially by agreement. This contention was overruled in the case of Harpelle v. Carroll, reported 27 Ontario Reports, 240. The repeal of the 1895 Act renders any further discussion of its particular wording unnecessary. If it was intended to base the right to make a distress upon agreement only, it failed to do so.

145. The new section (1896) omits the 1895 words "shall be deemed to be founded on the express or implied contract of the parties." It only says that the relation of landlord and

Express stipulation may confer right.

tenant is not to depend on tenure, and that a reversion or remainder is not necessary to create that relation, and therefore, apparently, a landlord who has parted with his reversion ought still to be able to distrain for rent due before he parted with such reversion. But this section does not say he can.

146. The last words of the 1896 clause, "nor shall any agreement between the parties be necessary to give to a landlord the right of distress," were inserted to make quite clear what the Court had somewhat doubtfully decided in Harpelle v. Carroll.

147. If A. is a landlord, B. his tenant, and C. is B.'s sub-tenant, the new Act does not extend A.'s rights by way of distress over B.'s goods. It does not expressly extend A.'s right as against C. in case of merger or sur render by B. of his term. It is difficult to see of what value the section is.

Right of assignee of reversion to distrain.

148. An assignee of the lessor could not distrain for rent due before the assignment, for there was no privity of estate between him and the lessee. Nor could he sue, because any transfer of the right to sue for the breach of covenant is void on the common law principle of maintenance, and the statute 32 Hen. VIII. c. 34, does not transfer to him such right.

149. It is doubtful whether, under the section of the Ontario Act of 1896, above quoted, the assignee of the reversion can distrain. If the section meant that he could distrain it is very obscurely drawn.

150. Where there is no reversion in the person entitled to the rent, the right to distrain for it may be created by expressed stipulation. Thus, if a lessee for years grants an under-lease of all but the last day of his term, or if while assigning the whole of his term on a rent, he expressly reserved the right to distrain to himself, he will be able to distrain for any rent which he may reserve. A tenant from year to year who under-lets from year to year has a sufficient reversion to distrain. In the absence of a reversion or an expressed power of distress, the rent can only be recovered by action.

151. An executor may distrain before a will is admitted to probate. Executor's right to distrain.

152. By sections 12 and 13 of the Revised Statute respecting Trustees and Executors (R. S. O. c. 110), the executors or administrators of any lessor or landlord may distrain upon the lands demised for any term or at will for the arrearages of rent due to such lessor or landlord in his lifetime, in like

manner as such lessor or landlord might have done if living.

153. Such arrearages may be distrained for at any time within six months after the determination of the term or lease, and during the continuance of the possession of the tenant from whom the arrears became due; and all statutory provisions relative to distresses for rent are applicable to such distresses.

Mortgagee's right to distrain.

154. If a mortgagee gives notice of a mortgage to a tenant in possession under a lease or letting executed or effected prior to the mortgage, he may distrain for all arrears of rent in the hands of the tenant at the time of the notice, as well as for what accrues subsequently to it. A mortgagee, who has the right to enter on the mortgaged premises after default in payment of his interest, has also the right to evict tenants in possession under leases or lettings subsequent to the mortgage. Such tenants will be justified under an actual threat of eviction in attorning to the mortgagee, that is, acknowledging him as the landlord and paying rent to him as such, and after that has once been done, the mortgagee may distrain upon them. A mortgagee may insist upon this attornment, but if he is content with the tenant's merely paying over the rent to him without making any acknowledgment,

expressed or implied, of his title as landlord, then he would not be entitled to distrain, though he might evict, and the right to distrain would remain to the mortgagor. If a tenant pay rent, or any part of it, to the mortgagee under a threat of eviction, he would be entitled to have it allowed in account with his landlord, the mortgagor, as money paid under constraint on account of the landlord. The latter could not levy any distress or bring any action for rent so long as the amount due did not exceed the payments thus made on his behalf to the mortgagee.

155. These remarks will still further impress upon the reader's mind the necessity for searching as to whether there are any mortgages on premises which he may intend to lease.

What may be distrained.

156. The general rule with regard to the things that might be distrained was that all chattels and personal effects found on the demised premises might be distrained whether they belonged to the tenant or to a stranger. This general rule has been practically reversed by our Legislature, as will be presently seen. With regard to goods the property of the tenant, the goods which at common law cannot be distrained are as follows:

General rule.

Exceptions at common law.

(1) Fixtures, even although they are what

are usually called "tenant's fixtures," that is, such as a tenant could remove when he quits the premises.

(2) Things in actual use are also absolutely privileged, for instance, the horse on which a man is actually riding, the tools with which a man is actually working, etc.

(3) Things in the custody of the law, as goods, chattels, etc., in the pound or taken by and remaining in the possession of a sheriff's officer under an execution. But by 8 Anne, c. 14, s. 1, before goods seized by a sheriff under an execution put in by any other person than the landlord himself, can be removed, the immediate landlord must be paid, either by the sheriff or the execution creditor, one year's rent, if the property is held on a yearly rental, and so much remains due at the time of the seizure. As soon as a landlord hears that an execution is put in he ought to give notice to the sheriff of his claim on account of rent; otherwise, unless he can prove that the sheriff was aware of the arrears, he will lose advantage of the Act.

If the goods on the premises are not sufficient to satisfy a year's rent, the sheriff cannot execute a writ of execution, but must withdraw.

(4) Money, unless it is in the bank, and

articles of a perishable nature, such as fruit, fresh meat, milk, fish, etc.

(5) Animals in a wild state are not liable to distress.

Conditional privilege.

157. Besides things which are absolutely privileged from distress, there are others which, in the language of the law, are conditionally privileged; that is to say, that they must not be taken if there are other goods on the premises sufficient to satisfy the distress; such are sheep and beasts that gain the land (that is, by which the land is worked), the instruments of a man's trade or profession, as the axe of a carpenter, the anvil of a smith, the loom of a weaver, etc., over and above the amount of the statutory exemptions.

Growing crops.

158. By 11 Geo. II. c. 19, ss. 8 and 9, the landlord is empowered to distrain growing crops of grain and grass, hops, roots, fruits, pulse, or other products, to gather them when ripe, but not before; to place them in a barn on the premises, if possible, and if not, as near as may be, and then, after a week's notice to the tenant of the place of deposit and intended sale, to sell these as distresses are usually sold. Growing crops seized under an execution, unlike those seized under distress, may be sold before they are ripe, but so long

as they remain on the land for sale, they are liable to be distrained for rent which comes due after the seizure, and sold, provided there is no other sufficient distress. The landlord has in respect of them the same right to a year's rent due before the seizure and sale, as he has in regard to other chattels under 8 Anne, c. 14. The landlord is not obliged to take them before having resort to the things just mentioned as conditionally privileged.

159. When growing crops* are seized for rent they may, at the option of the landlord, or upon the request of the tenant, be advertised and sold in the same manner as other goods, and it is not necessary for the landlord to reap, thresh, gather or otherwise market them. (R. S. O. c. 143, s. 32.)

Any person buying a growing crop at a sale under seizure for rent is liable for the rent of the lands upon which the crop is growing at the time of sale and until the crop is removed, unless the rent is otherwise satis-

*Growing crops, sown by the person in possession, and intended to be reaped at maturity, being fructus industriales, are chattels seizable under execution, and the ownership of them is not an interest in land within the 4th section of the Statute of Frauds. They are bound by the delivery to the sheriff of an execution against the owner, and they must equally be bound by the act of the owner. They are not within the Registry Act, because they are chattels. (Cameron v. Gibson, 17 O. R. 238).

fied. The rent is the same as the original tenant would have to have paid. (R. S. O. c. 143, s. 33.)

160. Growing crops, sown by the person in possession, and intended to be reaped at maturity, being fructus industriales, are chattels seizable under execution, and the ownership of them is not an interest in land within the 4th section of the Statute of Frauds. They are bound by the delivery to the sheriff of an execution against the owner, and they must equally be bound by the act of the owner. They are not within the Registry Act, because they are chattels. (Cameron v. Gibson, 17 O. R. 238.)

Goods on premises not property of tenant to be exempt.

161. The rule as to exemptions from distress of the property of strangers is now contained in the following statutory provisions, which form section 28 of the Landlord and Tenant Act (R. S. O. c. 143), as amended to date:

(1) A landlord shall not distrain for rent on the goods and chattels the property of any person, except the tenant or person who is liable for rent, although the same are found on the premises. But this restriction shall not apply in favour of a person claiming title under or by virtue of an execution against the tenant, or in favour of any person whose title is derived by purchase, gift, transfer or assignment from the tenant, whether absolute or in trust, or by way of mortgage or otherwise.

Nor to the interest of the tenant in any goods on the premises in possession of the tenant under a contract for purchase, or by which he may or is to become the owner thereof upon performance of any condition.

Nor where goods have been exchanged between two tenants or persons, by the one borrowing or hiring from the other, for the purpose of defeating the claim of or the right of distress by the landlord.

Nor shall the restriction apply where the property is claimed by the wife, husband, daughter, son, daughter-in-law, or son-in-law of the tenant, or by any other relative of his, in case such other relative lives on the premises as a member of the tenant's family.

(2) Nothing in this section contained shall exempt from seizure by distress goods or merchandise in a store or shop managed or controlled by an agent or clerk for the owner of such goods or merchandise, when such clerk or agent is also the tenant and in default, and the rent is due in respect of the store or shop and premises rented therewith and thereto belonging, when such goods would have been liable to seizure but for this Act.

(3) The word "tenant" in this section shall extend to and include the sub-tenant, and the assigns of the tenant, and any person in actual occupation of the premises under or with the assent of the tenant during the currency of the lease, or while the rent is due or in arrear, whether he has or has not attorned to or become the tenant of the landlord.

162. The exemptions from the tenant's own property are laid down in the following section (27) of the Landlord and Tenant Act (R. S. O. c. 143):

The goods and chattels exempt from seizure under execution shall not be liable to seizure by distress by a landlord for rent in respect of a tenancy created after the 1st day of October, 1887, except as hereinafter provided; nor shall such goods be liable to seizure by a collector of taxes accruing after the said 1st day of October, 1887, unless they are the property of the person actually assessed for the premises, and whose name also appears upon the collector's roll for the year as liable therefor.

(2) The person claiming such exemption shall select and point out the goods and chattels as to which he claims exemption.

Provided, that in the case of a monthly tenancy, such exemption shall only apply to two months' arrears of rent. *

163. Sections 1, 3 and 5 of the Execution Act (R. S. O. c. 64) specify the exemptions as follows: Exemptions from tenant's own property.

(1) The bed, bedding and bedsteads (including a cradle) in ordinary use by the debtor and his family. Bedding.

(2) The necessary and ordinary wearing apparel of the debtor and his family. Apparel.

(3) One cooking stove, with pipes and furnishings, one other heating stove with pipes, one crane and its appendages, one pair of andirons, one set of cooking utensils, one pair of tongs and shovel, one coal Furniture.

* This proviso was added in 1892 (chapter 31 of statutes of that year). It means, or ought to mean by correct interpretation of its language, that if there is a monthly tenancy, then up to the amount of two months' arrears the exemptions cannot be touched. If there are more than two months' arrears, then for the surplus over the two months the goods which would otherwise be exempted are liable.

scuttle, one lamp, one table, six chairs, one washstand with furnishings, six towels, one looking glass, one hair brush, one comb, one bureau, one clothes press, one clock, one carpet, one cupboard, one broom, twelve knives, twelve forks, twelve plates, twelve teacups, twelve saucers, one sugar basin, one milk jug, one tea pot, twelve spoons, two pails, one wash tub, one scrubbing brush, one blacking brush, one washboard, three smoothing irons, all spinning wheels and weaving looms in domestic use, one sewing machine and attachments in domestic use, thirty volumes of books, one axe, one saw, one gun, six traps, and such fishing nets and seines as are in common use, the articles in this subdivision enumerated not exceeding in value the sum of $150.

Fuel and provisions.

(4) All necessary fuel, meat, fish, flour and vegetables actually provided for family use, not more than sufficient for the ordinary consumption of the debtor and his family for thirty days, and not exceeding in value the sum of $40.

Animals.

(5) One cow, six sheep, four hogs, and twelve hens, in all not exceeding the value of $75, and food therefor for thirty days, and one dog.

Tools.

(6) Tools and implements of, or chattels ordinarily used in the debtor's occupation to the value of $100.

Bees.

(7) Bees reared and kept in hives to the extent of fifteen hives:

Debtor may take proceeds of sales of implements, etc. in money.

The debtor may, in lieu of tools and implements of, or chattels ordinarily used in his occupation, referred to in subdivision six above, elect to receive the proceeds of the sale thereof up to $100, in which case the officer executing the writ shall pay the net proceeds of such sale, if the same shall not exceed $100; or, if the same shall exceed $100, shall pay the sum to the debtor in satisfaction of the debtor's right to exemption under said subdivision six, and the sum

to which a debtor shall be entitled hereunder shall be exempt from attachment or seizure at the instance of a creditor.

The debtor, his widow or family, or in the case of infants, their guardian, may select out of any larger number the several chattels exempt from seizure. The debtor may select.

164. The mode of procedure for the claiming of exempted chattels is laid down by section 30 of the Landlord and Tenant Act as follows: Procedure on claiming exemptions.

(1) A tenant who is in default for non-payment of rent, and claims the benefit of the exemptions to which he is entitled under this Act, must give up possession of the premises forthwith, or be ready and offer to do so. Tenant claiming exemption must surrender premises.

(2) The offer may be made to the landlord or to his agent, and the person authorized to seize and sell the goods and chattels, or having the custody thereof for the landlord, shall be considered an agent of the landlord for the purpose of the offer and surrender to the landlord of the possession.

(3) The surrender of possession in pursuance of the landlord's notice shall be a determination of the tenancy.

(4) Where a landlord desires to seize the exempted goods, he shall, after default has been made in the payment of rent, and before or at the time of seizure, serve the tenant with a notice, which shall inform the tenant what amount is claimed for rent in arrear, and that in default of payment, if he gives up possession of the premises to the landlord after service of the notice, he will be entitled to claim exemption for such of his goods and chattels as are exempt from seizure under execution, but that if he

neither pays the rent nor gives up possession, his goods and chattels shall be liable to seizure and will be sold to pay the rent in arrear and costs.

(5) The notice may be in the following form, or to the like effect:

Take notice, that I claim $ for rent due to me in respect of the premises which you hold as my tenant, namely (here briefly describe them): and unless the said rent is paid I demand from you immediate possession of the said premises, and I am ready to leave in your possession such of your goods and chattels as in that case only you are entitled to claim exemption for.

Take notice further, that if you neither pay the said rent nor give me up possession of the said premises after the service of this notice, I am by law entitled to seize and sell, and I intend to seize and sell, all your goods and chattels, or such part thereof as may be necessary for the payment of the said rent and costs.

This notice is given under the Act of the Legislature of Ontario respecting the law of Landlord and Tenant.

Dated this day of A.D.
To C. D. (tenant). (Signed) A. B. (landlord).

(6) Service of papers under this Act shall be made either personally or by leaving the same with some grown person being in and apparently residing on the premises occupied by the person to be served.

(7) If the tenant cannot be found, and his place of abode is either not known, or admission thereto cannot be obtained, the posting up of the paper on some conspicuous part of the premises shall be deemed good service.

(8) No proceeding under this section shall be deemed defective or rendered invalid by any objection of form.

When distress can be made.

165. No distress can be made until the day after that on which the rent becomes due, nor between sunset and sunrise, nor after tender of the rent. At common law no distress could have been made after the determination of the lease or tenancy; but now, by 8 Anne, c. 14, s. 6, if a lease has been determined by lapse of time or by notice to quit, the landlord may distrain for rent accruing due before within six months after such determination, provided his own title to the property still continues, and the same tenant still remains in possession.

Where distress can be made.

166. The landlord can only distrain for rent upon the premises in respect of which it is payable. To this rule, however, there are some exceptions. If a landlord coming to distrain sees beasts upon the premises, but before he can distrain the tenant drives them off, the landlord may follow and take them and by 11 Geo. II. c. 19, if a tenant fraudulently or clandestinely removes goods from the demised premises to prevent the lessor from distraining them for rent in arrear, the lessor, or his bailiff or agent, may, within 30 days next after such removal, take and seize them wherever they may be found, unless they have in the meantime been sold bona fide to some person ignorant of the fraud.

Fraudulent removal.

167. This statute does not apply to the case of a removal of a stranger's goods from the premises, nor to the removal of the goods of a tenant which are assigned by one of his creditors in satisfaction of a bona fide debt. It will be remembered that we are only speaking here of the right to distrain. The removal by a creditor might be a breach of the Fraudulent Preferences Act, and the landlord might have his claim to a share of the proceeds of these goods like any other creditor. Nor does the statute apply to the removal of a tenant's goods before the day on which the rent becomes due. If removed on the morning of the day on which the rent becomes due they may be followed and seized under the statute. By section 7 of this Act, when goods are fraudulently removed, and are placed in any house or place, locked up or otherwise secured, the landlord, or his agent, may, with the assistance of a police officer, and in the case of a dwelling-house, on oath being made before a magistrate of a reasonable ground to suspect that the goods are in it, break open the house in the day time and distrain the goods as if they had been in any open place. The constable to be present may be one specially appointed for the occasion.

Chattel mortgagee's claims.

168. In practice it is often found that goods thus removed are liable to a chattel mortgage, and the landlord's priority over such

chattel mortgage ceases as soon as the goods are removed from the demised premises. In taking proceedings under this Act, therefore, the landlord must be careful to ascertain before he incurs any expense whether the goods are covered by a chattel mortgage or not. If he chooses to pay off the chattel mortgage, and take an assignment of it or discharge it, he could then seize the goods, because the ownership would be revested in the tenant. If he sold the goods without reference to the chattel mortgage he would be liable in damages to the chattel mortgagee. By section 1 of 11 Geo. II. c. 19, the tenant, or any person assisting him in carrying away or concealing goods, has to forfeit to the landlord double the value of such goods, to be recovered, where the goods exceed the value of £50, by action or suit, and where the value is below that amount, under section 4, by summary proceedings before two justices. In the latter case the justices have the power to commit for six months if the money is not paid and no sufficient distress can be found. Police magistrates in cities in Ontario have the same power as two justices of the peace.

Amount of distress.

169. The landlord must, in the first place, be careful not to distrain for more rent than is actually due; and, in the second place, to distrain at one time for the whole of that which is due. If, indeed, there has been some

mistake as to the value of the goods, and the landlord having fairly supposed the first distress to be sufficient to realize the whole rent due, afterwards finds that it will only cover a part, he may then distrain again for the remainder; or if, after putting in a distress, he has at the request of the tenant agreed to postpone it and has withdrawn, he may then distrain a second time.

Entry into premises distrained upon.

170. The outer door of a house, except in the case of goods fraudulently removed, cannot be broken open. It is not a breaking to open it by the usual means adopted by persons having access to the building; but when the outer door has once been passed, the inner doors may be forced, and if the landlord or his agent, having been once lawfully in the house, and have begun to make distress, are forcibly ejected, they may then break open the outer door to re-enter.

Who may make a distress.

171. A distress may be made either by the landlord himself or by an authorized agent, called a bailiff. To justify a landlord in calling in a policeman, it must be shown that his presence was rendered necessary by violence or threats.

Warrant of distress.

172. The authority is usually given to a bailiff in writing by what is called a warrant of distress, but if a landlord's agent distrain

without his orders, subsequent ratification of his acts is as effectual as a previous direction.

Mode of making a distress.

173. The usual mode of making a distress is for the landlord or his bailiff, having entered, to lay his hand upon and take hold of some article of furniture or other chattel, and declare that he seizes it as a distress in the name of all the goods in the house; but it will be quite sufficient if, after entry, he announces his intention to take the whole or certain articles named as the distress.

Inventory.

174. When the seizure has been thus made, the next thing is to draw up an inventory of as many goods as are sufficient to cover the rent distrained for, and also the costs of the distress. A copy of the inventory must then be made, and this, with the notice usually written at the foot of the inventory, of the fact of the distress having been made and the goods contained in the inventory having been taken, of the rent distrained for, and of the date on which the rent and costs must be paid or the goods replevied, must be served upon the tenant, either personally or by leaving it for him at his house, or if there is no house, on the premises, or if no person is there with whom the notice can be left, then by sticking it up in some prominent place on the fence. A witness should be present tc prove the regularity of the proceedings.

Removal of goods.

175. When the distress has been made and the inventory drawn up, the landlord may then remove the goods off the premises to any convenient place of security, of which the tenant must have notice, with the inventory, and where they are impounded.

Pounding cattle.

176. If, however, cattle are seized, they must not be driven out of the municipality in which they are taken, except to an open pound in the same municipality, not more than three miles from the place of distress. A distress is, however, now hardly ever removed from the premises, because by 11 Geo. II. c. 19, it was enacted that it shall be lawful for any person or persons lawfully making any distress for any kind of rent, to impound it or otherwise secure the distress so made, of whatever nature or kind whatsoever it may be, in such place or in such part of the premises chargeable with the rent as shall be most fit and convenient for the impounding or securing of such distress. Under this statute the landlord may, even without the tenant's consent, take such part of the premises, or even the whole, as is necessary for securing the goods, and place a man in possession of them there; but it has been held that, if it is not necessary to use the whole of the premises for the purpose, he must place the goods distrained in one or more rooms, according to the space required, unless the tenant, as he

usually does, allow them to remain in their ordinary places. No particular form is now required to constitute an impounding. As soon as the distrainor has made out and delivered to the tenant, or has left upon the premises, an inventory of the goods he has taken, they are impounded, and then, even though no one is left in possession, as soon as this is done they are in the custody of the law, and if the tenant retake them he will be liable to indictment, and also to an action for damages.

Landlord must not use impounded things.

177. The landlord must not use or consume any animals or things impounded. If he does, the tenant will have an action for damages. To this there is one exception—a landlord may milk cows which have been distrained, for this is necessary for the preservation of the animals. A distrainor is now bound to feed impounded cattle if the owner does not.

Appraisement.

178. If a tenant, after he has received notice of distress, do not within five days* pay the rent, with the costs of the levying or replevying of his goods, the distrainor may, by 2 W. & M. c. 5, s. 3, with the assistance

* The five days are to be calculated inclusive of the last day and exclusive of the date of seizure; thus, if the distress is taken and notice given on the 1st of March, it will not be lawful to sell until the 7th March.

of the sheriff of the county or a constable, cause the same to be appraised by two sworn appraisers, whom the sheriff or constable are authorized to swear, and after such appraisement may sell the same, and apply the proceeds to the satisfaction of the rent and the charges of the distress and appraisement, leaving the surplus, if any, in the hands of the sheriff or constable for the owner's use.

Distrainor must not retain possession of the goods.

179. The distrainor cannot retain possession of the goods on the premises of the tenant for more than five days, together with such further reasonable time as may be necessary for appraising and selling the same, unless he has the express consent of the tenant for such further retention of the goods and occupation of the premises. A delay of this kind frequently takes place when the tenant wishes further time to enable him to raise the money to pay his rent. This consent ought to be in writing for the sake of safety, although it may be legally given by word of mouth. If the bailiff or person actually making the distress on behalf of the landlord acts as one of the appraisers, the distress will be rendered irregular. The appraisers need not be professional appraisers, but they must be reasonably competent. They must value every article in the inventory separately, and then indorse the inventory with a signed memorandum of the total valuation.

Sale.

180. The goods may then be put up for auction, but the appraisers may take them at their own valuation, the law presuming that goods sold as appraised are sold at the best prices. The distraining bailiff must sign the receipt for the money realized at the end of the inventory. If the amount received exceeds that of the rent and costs of distress the surplus must be left in the hands of the sheriff or constable for the tenant. Goods followed and distrained after a fraudulent removal are to be sold in the same manner as if they had been seized on the premises.

Action for rent.

181. Besides the remedy by distress the landlord has also the right to bring an action for his rent. If a tenant, having entered into possession of premises on the understanding that he is to make some compensation for their use without any express stipulation for the payment of a rent certain, then no distress can be made, but the landlord may bring an action for reasonable compensation for the occupation. Even if the occupation were that of a squatter or trespasser the landlord could bring such an action. He might, in such a case, eject the party, but he has also the option of treating him as a tenant, and compelling him to pay for the use of the premises.

Power of re-entry.

182. It is usual in leases to afford the landlord, if not the remedy for the payment

of rent, at least protection against the accumulation of arrears, by giving him the power to re-enter and terminate the lease if the rent be not paid within a certain number of days after it has become due.

Costs in respect of seizure of exempted goods.

183. The costs of distress for rent are provided for as follows:

First, as to exempted goods (R. S. O. c. 143, s. 34):

No costs shall be levied for or in respect of the seizure upon exempted goods when they may not be lawfully sold, and when sold no greater sum in all than $2.00 and actual and necessary payments for possession money shall be levied or retained for or in respect of costs and expenses of sale of such exempted goods.

Fees to be charged under $80.

184. Second, as to seizure where distress is for sums under $80 (R. S. O. c. 63):

No person making distress for rent or for a penalty, where the sum demanded and due does not exceed $80 in respect of the rent or penalty, and no person employed in making the distress or doing any act in the course of the distress, or for carrying the same into effect, shall take or receive from any person, or out of the produce of the chattels distrained and sold, any other costs in respect of the distress than such as are set forth in Schedule A hereunto annexed, and no person shall make a charge for anything mentioned in the said schedule, unless such thing has been really done.

If a person offends against any of the provisions of the preceding section, the party aggrieved may apply to a justice of the peace for the county, city, or town

where the offence was committed for the redress of the grievance, whereupon the justice shall summon the person complained of to appear before him at a reasonable time, to be fixed in the summons, and the justice shall examine into and hear the complaint and defence, and if it appears that the person complained of has so offended, the justice shall order and adjudge treble the amount of the money unlawfully taken and full costs to be paid by the offender to the party aggrieved.

No person aggrieved by a distress for rent or a penalty, or by any proceeding had in the course thereof, or by any costs or charges levied upon him in respect of the same, shall be barred from any action or remedy which he might have had before the passing of this Act, except so far as any complaint preferred under this Act has been determined by the order and judgment of the justice before whom it has been heard and determined, and in case the matter of the complaint is made the subject of an action the order and judgment may be given in evidence under the defence of not guilty.

(Schedule A.)

Costs and charges on distress for small rents and penalties:

Levying distresses under $80	$1 00
Man keeping possession per diem...	75
Appraisement whether by one appraiser or more, two cents in the dollar on the value of the goods.	
If any printed advertisement, not to exceed in all $1.	
Catalogues, sale and commission, and delivery of goods—five cents in the dollar on the net produce of the sale.	

185. Third, where the seizure is for distress for sums over $80 (R. S. O. c. 143, ss. 35 to 40): Fees when over $80.

When the sum to be levied by distress for rent, or for any penalty, exceeds the sum of $80, no further charges shall be made for or in respect of costs or expenses by any person making the distress, employed in doing any act in the course of such distress, than the following, that is to say:—

(*a*) The actual expenses or outlay reasonably incurred in removing the goods distrained, or part thereof, when such removal is necessary.

(*b*) Advertisement when necessarily published in a newspaper $2.50, but not to exceed $5.00.

(*c*) If any printed advertisement otherwise than in a newspaper $1.00, but not to exceed $3.00.

(*d*) The sum of $1.00 per day for man keeping possession in lieu of 75c. per day.

(*e*) When the amount due shall be satisfied in whole or in part after seizure and before sale the bailiff or person seizing shall be entitled to charge and receive but three per cent. on the amount realized in lieu of five per cent. and no more.

The person whose goods are distrained, or the person authorizing the distress, or any person interested, may, upon giving two days' notice in writing, have the costs of the bailiff or other person making the distress, and the disbursements charged, taxed by the clerk of the Division Court within whose division the distress has been made.

The bailiff or person so making the said distress shall furnish the clerk with a copy of his costs, charges and disbursements, for taxation at the time mentioned in the notice, or at such other time as the clerk may direct, and in default of his so doing he shall not be entitled to any costs, charges, or disbursements whatever.

The clerk upon such taxation shall, amongst other things, consider the reasonableness of any charges for removal, keeping possession, and for advertising, or

any sums alleged to have been paid therefor, and may examine either party on oath touching the same. The person requiring the taxation shall pay the clerk a fee of twenty-five cents therefor.

Where that portion of the bill or charges in dispute amounts to the sum of $10, either party may on giving two days' notice have the taxation revised by the clerk of the County Court. He shall be paid a fee of fifty cents for such revision by the person appealing, and it may in the discretion of the clerk be deducted from or added to the bill as finally taxed by him.

Penalty for extortion.

186. Persons overcharging are liable, on proceedings being taken before a justice of the peace, to pay treble the amount of money actually taken and costs. A landlord can not be so punished unless he personally levied the distress. This proceeding before a justice is in addition to any right of action there may be for damages.

CASES.

General rules as to consequences of delay in selling.

The plaintiff as landlord distrained the goods of his tenant on 16th July, and left them in the custody of the tenant, who agreed to hold possession and deliver them up when required. On 10th August a chattel mortgagee seized and removed the goods.

In an action for pound breach under 2 W. & M. c. 5, s. 4, by the landlord against the chattel mortgagee and his bailiff: Held, that the landlord had the right to impound and secure the goods on the premises, and at the expiration of five days to sell them, and had a reasonable time after the expiration of the five days to sell which had elapsed in this case; that there was a good distress and a good impounding, and the agreement bound the tenant, but not the mortgagee,

who was entitled to have the provisions of the law carried out; and who could, after the expiry of a reasonable time for sale, say the goods are not in the custody of the law, but of the landlord, under an agreement with the tenant, and in taking them under his chattel martgage he did not commit a pound breach:

Langtry v. *Clark*, 16 C. L. T. 109.

A bailiff seized certain goods under a landlord's distress warrant for rent in arrear, but did not remain in possession or take any further steps to execute the warrant, except that, as the jury found, the tenant was constituted the landlord's agent to take possession of the goods for him under the warrant. After the lapse of more than a month a chattel mortgagee took possession of the goods under his mortgage and removed them: Held, that the landlord was not entitled to recover them:

Roe v. *Roper*, 23 C. P. 76.

Tenant cannot affect rights of mortgagee.

It is doubtful whether a tenant can waive all statutable formalities as to inventory, etc., as regards the mortgagee:

Whimsell v. *Giffard*, 3 O. R. 1.

Head landlord seizes goods of person in possession.

The plaintiffs were let into possession of certain demised premises by the agent of the tenants, who afterwards repudiated the agent's authority and refused to recognize the plaintiffs as sub-tenants. The defendant, who was head landlord, in the meantime distrained the plaintiffs' goods for arrears of rent, and the plaintiffs brought this action to recover damages.

Held, that the plaintiffs were in possession within the meaning of ss. 3 of R. S. O. c. 143, s. 28, and the distress was lawful:

Farwell v. *Jamieson*, 16 C. L. T. 211.

A removal of goods distrained held not unlawful.

The plaintiff having remained in possession and paid rent after the expiry of his term, the defendants levied a distress upon plaintiff's goods in the premises situate six miles from Toronto, for two months' arrears of rent, and removed the goods to Toronto to impound and sell. The plaintiff brought an action of trespass, claiming that he was not defendant's tenant: Held,

1. That the relationship of landlord and tenant existed at the time of the distress.

2. That the removal to Toronto, unless unnecessary and unreasonable or malicious, was not a good ground of action:

Macgregor v. *Defoe*, 14 O. R. 87.

An illegal distress.

On a distress for rent no notice thereof in writing was given to the lessee, nor a legal appraisement made before sale; and the actual value of the goods sold was much greater than the amount due for rent: Held, that the distress was illegal:

Howell v. *Listowell*, 13 O. R. 476. (See this case also on subject of Tender.)

Third party's right.

Where a landlord has distrained for arrears of rent goods upon the demised premises liable to such distress, belonging in part to the tenant and in part to a third party, such third party has no right to compel the landlord to sell the part belonging to the tenant before selling the part belonging to such third party:

Pegg v. *Starr*, 23 O. R. 83.

Withdrawal of distress.

The withdrawal of a first distress, not being a voluntary one, but under a special arrangement, did not prevent the landlord from making a second distress. The second distress could be supported by reason of the first distress being withdrawn through the tenant's fraud. Section 4 of 58 V. c. 26, does not preclude a right of distress, unless there is an ex-

press contract therefor contained in the lease; and the section is not retrospective:

Harpelle v. *Carroll*, 16 C. L. T. 118.

The effect of a taking a note on the right to distrain.

The mere taking of a note for rent will not take away the right to distrain, but it is otherwise where in consideration of receiving it the landlord expressly agrees to wait until it is dishonoured. In this case such an agreement was proved:

Simpson v. *Hewitt*, 39 U. C. R. 610.

Threshing grain.

Where a sheriff, acting in good faith for all concerned, agreed to pay for having grain threshed for the purpose of its better sale, the expenses of such threshing should be allowed him:

Galbraith v. *Fortune*, 10 C. P. 109.

Yearly tenancy, distraining for rent under.

A letting at an annual rent constitutes a yearly tenancy, which continues at the same rate for the second year as the first, if the tenant remain in possession of the premises, and the landlord may distrain for the first year's rent at the end of the second year:

McClenaghan v. *Barker*, 1 U. C. R. 26.

To justify a distress there must be a distinct relationship of landlord and tenant of fixed premises.

The defendant, who owned the farm, agreed with the plaintiff to work it on shares, each of them supplying one-half of the seed and labour, and to have half the profits, the plaintiff to pay $60 for implements and $160 annually; but the plaintiff was not placed in possession of any distinct portion of the farm, the parties being equally in possession of the whole. Held, that there was no lease created between the parties, and that the $160 was not rent for which the defendant could distrain:

Oberlin v. *McGregor*, 26 C. P. 460.

Requisites for a good tender.

In order to constitute a legal tender the money must be produced and shewn to the creditor, or its production expressly or implidly dispensed with. To divest a landlord of his right to distrain a strict legal tender must be shown:

Matheson v. *Kelly*, 24 C. P. 598.

CHAPTER X.

FORFEITURE AND RE-ENTRY.

Right of entry.

187. The short form of lease, and, in fact, almost all leases contain a condition or proviso whereby it is declared that the lease shall be forfeited, and that the lessor shall have a right to re-enter and repossess himself of the premises, if the tenant commits a breach of some or any of the covenants of the lease; for instance, for non-payment of rent, for non-repairing, for waste, for not insuring, for carrying on prohibited trades, etc. In nearly all these cases it is obvious enough when a prohibited act has been committed and a forfeiture incurred.

Former requisites for re-entry.

188. Formerly, if the rent were not paid when due and demanded, a demand of the precise rent due (after all deductions) had to be made by the landlord or his agent on the day on which it was due and payable—before sunset—at the place, if any, fixed for payment, and if no place was fixed, then upon the demised premises. If the tenant did not then pay the rent, the landlord could immediately bring an action of ejectment and turn him out. Very frequently, however, the proviso relieved the

landlord from the necessity of demanding the rent, and in that case the tenant incurred a forfeiture if he did not himself go and pay or tender his rent on the appointed day. And however the proviso was worded in this respect, if half a year's rent were in arrear, and no sufficient distress found on the premises, the landlord might forthwith bring ejectment. If the tenant, by fastening the outer door, hindered the landlord from distraining, this rendered it unnecessary to prove that there was no "sufficient distress" on the premises. But the forfeiture could be waived by the landlord's putting a distress into the premises, or by his accepting rent which became due subsequently to the alleged forfeiture.

Right must be reserved.

189. The necessity for the proviso arose from the fact that mere non-payment of rent or breach of covenant by the tenant does not determine the lease, unless there be a right reserved to the landlord to re-enter thereon; and even then, so much does the law lean against forfeiture, that to determine a lease for forfeiture for non-payment of rent, great nicety, as above stated, formerly existed, unless, as became usual, the proviso for re-entry dispensed therewith. The form of proviso included in the Short Forms Act, it will be seen, does dispense with the demand for rent. So, whenever that form is used, there is not much difficulty. But in cases where the short

form of lease was not used the difficulty continued, therefore the Legislature provided as in the two sections now next following.

190. Section 9 of the Landlord and Tenant Act (R. S. O. c. 143):

Right of entry.

In every demise made or entered into after the 25th day of March, 1886, whether by parol or in writing, unless it shall be otherwise agreed, there shall be deemed to be included an agreement that if the rent reserved, or any part thereof, shall remain unpaid for fifteen days after any of the days on which the same ought to have been paid, although no formal demand shall have been made thereof, it shall be lawful for the landlord at any time thereafter into and upon the demised premises, or any part thereof, in the name of the whole, to re-enter, and the same to have again, repossess and enjoy, as of his former estate.

191. Section 31 of the Landlord and Tenant Act (R. S. O. c. 143):

Common law strict demand of rent dispensed with when landland entitled to re-enter.

Where a landlord has by law a right to enter for non-payment of rent, it shall not be necessary to demand the rent on the day when due, or with the strictness required at common law, and a demand of rent shall suffice notwithstanding more or less than the amount really due is demanded, and notwithstanding other requisites of the common law are not complied with; provided that unless the premises are vacant, the demand be made fifteen days at least before entry, such demand to be made on the tenant personally anywhere, or on his wife, or some other grown up member of his family on the premises.

Where half year's rent in arrear.

192. Before these two last sections were passed the strictness of entry required at common law had, as also above stated, been dispensed with in cases where half a year's rent was in arrear, and no sufficient distress was to be found on the premises countervailing the arrears then due, and the lessor had power to re-enter for non-payment. The following are the provisions of the Landlord and Tenant Act relating to this point. They form sections 17 and 22, inclusive, of the Landlord and Tenant Act:

Landlord having power to re-enter for non-payment.

In all cases between landlord and tenant, as often as it happens that one-half year's rent is in arrear and the landlord or lessor to whom the same is due has the right by law to re-enter for non-payment thereof, such landlord or lessor may, without any formal demand or re-entry, serve a writ for the recovery of the demised premises; or in case the same cannot be legally served, or no tenant is in actual possession of the premises, then the landlord or lessor may affix a copy thereof upon the door of any demised messuage; or in case the action is not for the recovery of any messuage, then upon some notorious place, of the lands, tenements, or hereditaments, comprised in the writ; and such affixing shall be good service thereof, and shall stand instead of a demand and re-entry.

How such right shall be exercised.

In case of judgment against the defendant for non-appearance, if it is shown by affidavit to the Court, or is proved upon the trial, in case the defendant appears, that half a year's rent was due before the writ was served, and that no sufficient distress was to be found on the demised premises countervailing the arrears then due, and that the lessor had power to re-enter, the lessor shall recover judgment, and have

execution in the same manner as if the rent in arrear had been demanded and re-entry made.

Consequences of exercising such right.

In case the lessee or his assignee, or other person claiming or deriving title under the lease, permits and suffers judgment to be had on such trial and execution to be executed thereon without paying the rent and arrears, together with full costs and without proceeding for equitable relief within six months after execution executed, then and in every case the lessee and his assignee, and all other persons claiming and deriving under the lease, shall be barred and foreclosed from all relief or remedy, other than by proceedings by way of appeal from the judgment, and the landlord or lessor shall from thenceforth hold the demised premises discharged from the lease.

As to mortgagees of lease.

Nothing hereinbefore contained shall bar the right of any mortgagee of such lease, or any part thereof, who is not in possession, if the mortgagee, within six months after such judgment obtained and execution executed, pays all rent in arrear, and all costs and damages sustained by the lessor or person entitled to the remainder or reversion, and performs all covenants and agreements which on the part and behalf of the first lessee are to be or ought to be performed.

Proceedings if the tenant ejected seeks equitable relief.

In case the lessee, his assignee or other person, claiming any right, title or interest of, in or to the lease, proceeds for equitable relief within the time aforesaid, such person shall not be entitled to a stay of the proceedings unless within forty days next after an application for a stay of the proceedings, he brings into Court and lodges with the proper officer such sum of money as the lessor or landlord swears to be due and in arrear, over and above all just allowances, and also the costs taxed in the said action, there to remain until the hearing of the application for equitable relief, or to be paid out to the lessor or landlord on good security, subject to the judgment or

If such proceedings be after execution executed.

order of the Court; and in case such proceedings for equitable relief are taken within the time aforesaid, and after execution has been executed, the lessor or landlord shall be accountable only for so much as he really and bona fide, without fraud, deceit, or wilful neglect, has made of the demised premises from the time of his entering into the actual possession thereof, and if what he has so made is less than the rent reserved on the lease, then the lessee or his assignee, before being restored to his possession, shall pay the lessor or landlord what the money so by him made fell short of the reserved rent for the time the lessor or landlord held the lands.

Discontinuance if tenant pays arrears of rent and costs before trial, etc.

If the tenant or his assignee at any time before the trial in the action pays or tenders to the lessor or landlord, or to his solicitor in the cause, or pays into Court, all the rent and arrears together with the costs, all further proceedings in the action shall cease; and if the lessee or his assigns, upon such proceeding as aforesaid, obtains equitable relief, he and they shall have, hold, and enjoy the demised lands according to the lease thereof made without any new lease.

Forfeiture for non-performance of covenants.

193. Besides re-entry or forfeiture for non-payment of rent, there may be also forfeiture for non-performance of covenants, as will be seen by again referring to the form of proviso furnished by the Act. With reference to such a right of re-entry or forfeiture the Legislature has enacted as follows, being section 11 of the Landlord and Tenant Act:

(1) A right of re-entry or forfeiture under any proviso or stipulation in a lease, for a breach of any covenant or condition in the lease, shall not be enforceable by action or otherwise, unless and until

the lessor serves on the lessee a notice specifying the particular breach complained of, and if the breach is capable of remedy, requiring the lessee to remedy the breach, and in any case requiring the lessee to make compensation in money for the breach, and the lessee fails within a reasonable time thereafter to remedy the breach, if it is capable of remedy, and to make reasonable compensation in money, to the satisfaction of the lessor for the breach. Restrictions on and relief against forfeiture of leases.

(2) Where a lessor is proceeding by action or otherwise, to enforce such a right of re-entry or forfeiture, the lessee may, in the lessor's action, if any, or in any action brought by himself, apply to the Court for relief, and the Court may grant or refuse relief, as the Court, having regard to the proceedings and conduct of the parties under the foregoing provisions of this section, and to all the other circumstances, thinks fit; and in case of relief may grant it on such terms, if any, as to costs, expenses, damages, compensation, penalty, or otherwise, including the granting of an injunction to restrain any like breach in the future, as the Court in the circumstances of each case thinks fit.

(3) For the purposes of this section a lease includes an original or derivative under-lease, also a grant at a fee farm rent, or securing a rent by condition; and a lessee includes an original or derivative under-lessee, and the heirs, executors, administrators and assigns of a lessee, also a grantee under such a grant as aforesaid, his heirs and assigns; and a lessor includes an original or derivative under-lessor, and the heirs, executors, administrators and assigns of a lessor, also a grantor, as aforesaid, and his heirs and assigns.

(4) This section applies, although the proviso or stipulation under which the right of re-entry or forfeiture accrues is inserted in the lease, in pursuance of the directions of any Act of Parliament or of this Legislature.

(5) For the purposes of this section, a lease limited to continue as long only as the lessee abstains from committing a breach of covenant shall be and take effect as a lease, to continue for any longer term for which it could subsist, but determinable by a proviso for re-entry on such a breach.

(6) This section does not extend:

(*a*) To a covenant or condition against the assigning, under-letting, parting with the possession, or disposing of the land leased, or to a condition for forfeiture on the bankruptcy of the lessee, or on the taking in execution of the lessee's interest; or,

(*b*) In case of a mining lease, to a covenant or condition for allowing the lessor to have access to, or inspect books, accounts, records, weighing machines, or other things, or to enter or inspect the mine or the workings thereof.

A "mining lease" is a lease for mining purposes, that is, the searching for, working, getting, making merchantable, carrying away, or disposing of mines and minerals, or purposes connected therewith, and includes a grant or license for mining purposes.

(7) This section shall not affect the law relating to re-entry or forfeiture, or relief in cases of non-payment of rent.

(8) This section applies to leases made either before or after the 25th day of March, 1886, and shall have effect notwithstanding any stipulation to the contrary.

* As to rights of entry where there has been a transmission of interest, see the chapter on Transmission of Interest later.

CASES.

Courts will if possible relieve against a forfeiture.

In actions to re-enter for breach of a covenant in a lease the Court will, since the Judicature Act, dispose of questions in their equitable rather than their legal aspect in all cases where, under the former practice the Court of Chancery would have relieved against the forfeiture. Thus, where the plaintiff claimed to recover possession of certain lands leased by her to the defendant on ground of breach of the covenant for the payment of taxes, which breach the defendant afterwards remedied before statement of claim filed: Held, that the action could not succeed, the breach being no more than the omission of a mere money payment:

Buckley v. *Beigle*, 8 O. R. 85.

Right of re-entry not enforced if covenant doubtful.

Where a covenant, accompanied by a right of re-entry on breach, is so expressed that its meaning is doubtful, and the tenant in good faith has done what he supposed to be a performance of it, forfeiture will not be enforced; the difficulty in construing the covenant is a special circumstance entitling the defendant to relief:

McLaren v. *Kerr*, 39 U. C. R. 507.

Receipt of rent a waiver of right of re-entry.

Plaintiff leased to defendant for twenty-one years with a covenant by defendant to erect within four years a house, etc., which covenant was broken, but the lessor received rent to a period subsequent to the time of the alleged forfeiture: Held, a waiver of the right of entry for breach of the covenant:

Roe v. *Southard*, 10 C. P. 488.

It is a dangerous thing to attempt.

Where a tenant holds over after the expiration of his lease, a landlord has a right to take possession of the premises if he can without a breach of the peace:

Boulton v. *Murphy*, 5 O. S. 731.

Forfeiture

What will amount to waiver of right to re-enter.

Rent under a lease made pursuant to the "Short Forms Act" becoming in arrear, the landlord served the statutory notice of forfeiture, and brought an action against the tenants both for the recovery of the demised premises and for the arrears of rent. Before the action came to trial the defendants paid the arrears and costs: Held, that the bringing of the action was an election on the part of the landlord to forfeit the lease which could not be retracted by him; to enable him to get rid of the forfeiture there must have been a request on the part of the tenants, either express or implied, to be relieved from the forfeiture; and the mere payment, after the forfeiture of rent which accrued due before, would not amount to such a request.

The effect of such a payment depends upon the intention of the party paying; and the payment of the rent and costs in this case could not operate by force of R. S. O. c. 143, ss. 17-22, to permit the landlord to retract his forfeiture, without regard to the intention of the tenants, and without any request on their part to be relieved from the forfeiture.

These sections are applicable simply to an action for the recovery of the demised premises; had the action been brought for that alone, an implication might have arisen from the payment of rent and costs that the tenant intended to seek to be relieved from the forfeiture; more especially as the demised premises were vacant land, the tenants not being in actual possession.

Held, further, that the landlord could not get rid of the forfeiture unless both tenants concurred in seeking relief from it:

Denison v. *Maitland*, 22 O. R. 166.

Form of notice.

A notice of forfeiture of a lease under R. S. O. c. 143, s. 11, s.s. 1, given in the words: "You have broken the covenant as to cutting timber, etc.," without more particularly specifying the breach and claiming compensation, is sufficient. After an action of ejectment

was commenced for the forfeiture of the lease, the landlord distrained for and received rent subsequently accruing due: Held, that such course did not per se set up a former tenancy, which ended on the election to forfeit manifested by the issue of the writ, but might be evidence for the jury of a new tenancy on the same terms from year to year:

McMal en v. *Vannatto*, 24 O. R. 625.

No relief as of right.

The Court will not make a declaration relieving against forfeiture of a lease for non-payment of rent when the trial of the action for that relief takes place after the term has expired by effluxion of time, even though the lease gives the option of purchase, to be exercised during the term which the lessees had attempted to exercise under a forfeiture.

The lessee is not entitled as a right to relief against forfeiture for non-payment of rent; that relief may be refused on collateral equitable grounds.

Coventry v. *McLaa*, 21 A. R. 176.

The provisions of s. 11, R. S. O. c. 143, do not extend to a forfeiture of the term under a stipulation in the lease that if the lessees should make any assignment for the benefit of creditors the term should immediately become forfeited, and such forfeiture is, therefore, enforceable without notice served upon the lessees:

Argles v. *McMath*, 26 O. R. 224.

Waiver.

Mere knowledge or acquiescence in an act constituting a forfeiture does not amount to a waiver; there must be some expenditure of money in improvements, or some positive act of waiver, such as receipt of rent:

McLaren v. *Kerr*, 39 U. C. R. 507.

Right to re-enter for con-

Breaches of a covenant in a farm lease to keep the fences in repair, and to keep eighteen acres in meadow during the term, are continuing breaches,

tinuing breaches of covenants not waived by receipt of rent.

and the right to re-enter for them is not waived by acceptance of rent:

Ainley v. *Balsden*, 14 U. C. R. 535.

Forfeiture by non-payment of rent.

In an action for possession, by reason of a forfeiture for non-payment of rent, the plaintiff must prove, if proceeding under 4 Geo. II. c. 28, that there was not sufficient distress on the premises; and if at common law, that the rent was demanded in proper time by a person duly authorized:

Cubitt v. *McLeod*, M. T. 4 Vict.

Action upon a forfeiture no demand necessary.

No notice or demand is necessary before action upon a forfeiture where there is a power of entry in a lease upon breach of a covenant to repair, or not to under-let:

Connell v. *Power*, 13 C. P. 91.

CHAPTER XI.

TRANSMISSION OF INTEREST.

Change in persons who are landlord or tenant.

194. It now becomes necessary briefly to mention some of the principal consequences which result from any change in the parties who, at the granting of a lease, or the commencement of a tenancy, stood towards each other in the relation of landlord and tenant. Such a change may be effected either by the landlord assigning his reversion (i.e., his interest in and ownership of the property subject

to the term of years, or other tenancy, held by the tenant), or by the tenant assigning his interest. Such assignments are invalid unless made by deed, but under some circumstances the Courts will treat an invalid assignment as an agreement for a valid one, and compel the assignor to execute a deed. The consequences of an assignment for benefit of creditors and the effect of the death of either party must also be considered. First, of assignments by either party.

Liability on covenants by lessee.

By landlord.

195. Now, when a lessee assigns the term of years created by the lease under which he holds it, it would be obviously unjust if he could discharge himself from liability upon the covenants into which by that lease he entered with his landlord. He, therefore, remains liable upon all during the whole continuance of the term; and, in addition to that, the person to whom he assigns is also liable—until he in turn assigns to some third party—upon all the covenants in the lease, which, according to the technical phrase, "run with the land." The assignee has also a right to insist on the performance of covenants of the same class, which are to be fulfilled by the landlord.

196. It becomes necessary to consider how far the liability on covenants in leases extends.

Implied covenants.

197. There are, apart from express covenants by the parties, covenants by implication of law. Thus, a covenant would be implied after entry from the words "yielding and paying" on the part of the lessee and his assigns to pay rent to the reversioner.

Express covenants control implied.

198. Covenants implied by law are controlled by express covenants between the parties on the same subject matter. No covenant will arise by implication of law on any matter as to which the parties have themselves expressly provided.

Privity of estate.

199. Implied covenants are binding between the parties by reason of the privity of estate between them, and are binding only so long as that privity of estate exists. Thus, on the implied covenant to pay rent to farm in a husband-like manner and use the premises in a tenant-like manner, which are covenants the law will imply, the lessee continues liable only so long as his privity of estate continues, that is, so long as he is lessee; for, if he assign, the privity of estate between him and his landlord ceases, and he is no longer liable. The privity of estate after assignment exists between the landlord and the assignee, and the assignee becomes liable in his turn during its continuance to the landlord on the implied covenants. On his assigning, he ceases to be liable, and so on through all assignments.

In other words, implied covenants always "run with the land," as the technical expression is, and the party who takes the estate, takes, during the time he holds such estate, the burden and the benefit of the implied covenants which go with the land. "Running with the land."

200. The original lessee cannot, by destroying the privity of estate between him and his landlord, escape liability on his implied covenant to pay rent, without his lessor's assent, which assent may be expressed or implied. Receipt of rent from the assignee by the lessor implies assent to the assignment. But no assent of the lessor is requisite to any assignment by an assignee, though such assignee be a pauper. Liability of original lessee.

201. The lessor, on his part, is liable on the implied covenant for quiet enjoyment arising from the word "demise" (in the absence of an express covenant), but his liability ceases on his assigning his reversion, which destroys the privity of estate between him and his lessee. So also, it ceases with the determination of his estate in reversion; as where a tenant for life demises for a term and dies before its expiry, no action lies against his executors on the implied covenant. Liability of lessor.

202. From what has been said as to the cesser of the liability of the lessee, as soon as Express covenants

his estate ceases on his assigning with his lessor's consent, it became important for the lessor to have express covenants under which the lessee should continue liable notwithstanding and after assignment. To these it became usual to add, as additional security, a clause of re-entry by the lessor and his assigns on breach.*

Clause of re-entry.

Liability on express covenants.

203. Express covenants are sometimes termed covenants in deed, as distinguished from implied covenants or covenants in law. The liability on express covenants arises out of privity of contract, as distinguished from the liability on implied contracts arising out of privity of estate.

How far assignee of estate of covenantor bound.

204. Any lawful contract may be the subject of express covenant, but there is sometimes great difficulty in determining how far, and in what particulars, an assignee of the estate of a covenantor is bound by, or entitled to the benefit of, a covenant; and how far covenants run with the land.

How far assignees bound by express covenants running with the land.

205. There are three heads under which the subject can be considered:

(1) Where assigns are within the covenants

*See the chapter on Right of Entry, which deals with that subject as between parties where no assignment intervenes.

though not named. In order to make a covenant run strictly with the land, so as to bind the assignee, or give him the benefit without his being named, it must relate directly to the land or to a thing in existence, parcel of the demise. Illustrations: Covenants to pay rent, to keep existing buildings and fences in repair, to observe particular modes of culture on the lessee's part, and the covenant for quiet enjoyment on the lessor's part.

(2) Where assigns are only within the covenants because they are named. Where the covenant respects a thing not in existence at the time, but which, when it comes into existence, will be annexed to the land, the covenant may be made to bind the assigns by naming them, but will not bind them unless named. Illustrations: Covenants to erect buildings or to plant trees on the premises.

(3) Where assigns are not within the covenants though named. When a covenant respects a thing not annexed, nor to be annexed, to the land, or a thing collateral, or in its nature merely personal, the covenant will not run, that is it will not bind the assignee nor pass to him, even though he is named. Illustrations: Covenants to repair or build a house off the premises.

206. As regards both the burden and benefit to assignees on these express covenants

running with the land, they depend on the privity of estate, and they continue only so long as that privity continues. If a breach have happened during the existence of the privity of estate, its subsequent determination will not destroy the liability for the breach.

As between lessor and lessee.

207. As between lessor and lessee there is privity both of contract and of estate. The lessee is liable on the demise to him which creates the privity of estate, and he is liable on his covenant to pay rent, which creates the privity of contract.

When lessee assigns.

208. When a lessee, having covenanted to pay rent, assigns his term, his liability on his covenants continues, for the privity of contract is not destroyed by the assignment. The privity of estate exists thenceforth between the lessor and the assignee, and each will be liable to the other on the covenants in the lease. Thus, the lessee will remain liable for rent under his covenant, and the assignee will be liable for such rent as may fall due while (but only while) he is assignee by virtue of the privity of estate.

When lessor assigns.

209. Now, suppose the landlord assign his reversion, what is the consequence?

Right of entry could not formerly be reserved to a stranger.

210. At common law a right of entry for breach of condition subsequent* could only be reserved to the grantor and his heirs, and not to a stranger. When reserved it could not be assigned, the simplicity of the common law requiring that every man should assert his own right of entry or action. The consequence was that in the case of a right of re-entry reserved to a lessor and his heirs for non-payment of rent, or other cause, the assignee of the lessor could take no advantage of the clause of re-entry. This difficulty was remedied, so far as regards grantees of reversions, by 32 Hen. VIII. c. 34, under which they have the same benefit of a condition in case of a breach subsequent to the grant to them, as their grantors would have had provided it relate to the payment of rent, the restriction of waste or other like object tending to the benefit of the reversionary estate.†

Remedied by 32 Hen. VIII. c. 34.

Effect of assent to non-observance of covenants.

211. As regards conditions of re-entry by the reversioner on breach of covenants by the

* Conditions subsequent are such by the failure or non-performance of which an estate already vested may be defeated.

† By R. S. O. c. 100, s. 9, "a right of entry, whether immediate or future, and whether vested or contingent into or upon land, may be disposed of by deed." The right of entry referred to in this statute is not a right of entry for condition broken, and therefore the right of an assignee to enter for condition broken still rests on the Statute of Henry. Where privity of contract and right of action are thus transferred the correlative rights and liabilities last only during the continuance of the respective assignees' interests.

tenant, much caution was formerly requisite in giving assent to the non-observance of the covenants, for, if once assent was given, the right of re-entry was gone forever, and no advantage could be taken of it on a subsequent breach; the principle being that every condition of re-entry was considered entire and indivisible, and if once it was waived it could not again be enforced. To meet this difficulty the following section of the Landlord and Tenant Act was passed (section 14):

Waiver not to extend further than to the particular instance mentioned

Where an actual waiver of the benefit of a covenant or condition in a lease, on the part of a lessor or his heirs, executors, administrators or assigns, is proved to have taken place after the 18th day of September, 1865, in any one particular instance, such actual waiver shall not be assumed or deemed to extend to any instance, or any breach of covenant or condition, other than that to which such waiver specially relates, nor to be a general waiver of the benefit of any such covenant or condition, unless an intention to that effect appears.

Implied waiver.

212. The waiver mentioned in this section is an actual or express waiver. There may be also an implied waiver, such as receipt with notice of the forfeiture of after-accrued rent. Such implied waivers are not provided for by this clause. Therefore, a landlord should insist on the forfeiture, or else if he does not insist on it, and afterwards receives subsequent rent, he will lose the right of re-entry on any subsequent breach of the same covenant.

License to do an act.

213. There is a difference between forgiving a man the consequence of an act after he has committed it, which is waiver, and giving him permission or license to do some thing before he commits it. Formerly when in a lease a right of re-entry was reserved to the lessor on the lessee assigning without license, and the lessor granted a license in any one particular case, that license covered the condition entirely, so that afterwards an assignment might be made without license, and no forfeiture could be incurred. This defect was remedied by the following section of the Landlord and Tenant Act (section 12):

Restriction on effect of license under power contained in lease, etc.

Where a license to do any act which, without such license, would create a forfeiture, or give a right to re-enter, under a condition or power reserved in a lease heretofore granted, or to be hereafter granted, has been, at any time since the 18th day of September, 1865, given to a lessee or his assigns, every such license shall, unless otherwise expressed, extend only to the permission actually given, or to any specific breach of any proviso or covenant made, or to be made, or to the actual assignment, under-lease, or other matter hereby specifically authorized to be done, but not so as to prevent a proceeding for any subsequent breach (unless otherwise specified in such license); and all rights under covenants and powers of forfeiture and re-entry, in the lease contained, shall remain in full force and virtue, and shall be available as against any subsequent breach of covenant or condition, assignment, under-lease, or other matter not specificially authorized, or made dispunishable by such license, in the same manner as if no such license had been given; and the condition or right of re-entry shall be, and remain in all

respects, as if such license had not been given, except in respect of the particular matter authorized to be done.

License to one of several sub-lessees

214. Further, if a reversioner licensed one of several lessees to assign his interest in whole, this license dispensed with the condition as to all. This anomaly was remedied by the following section, which it will be noticed extends only to a permission to do an act, and not to a license to omit to do an act, the non-performance of which would cause a forfeiture. The section in question is section 15 of the Landlord and Tenant Act, and reads as follows:

Restricted operation of partial licenses.

Where in a lease heretofore granted, or to be hereafter granted, there is a power or condition of re-entry on assigning or under-letting, or doing any other specified act, without license, and at any time since the 18th day of September, 1865, a license has been or is given to one of several lessees or co-owners, to assign or under-let his share or interest, or to do any other act prohibited to be done without license, or has been or is given to a lessee or owner, or any other of several lessees or owners, to assign or under-let part only of the property, or to do any other such act as aforesaid in respect of part only of such property, such license shall not operate to destroy or extinguish the right of re-entry. in case of any breach of the covenant or condition by the co-lessee or co-lessees, or owner or owners of the other shares or interests in the property (as the case may be) over or in respect of such shares or interests or remaining property, but such right of re-entry shall remain in full force over or in respect of the

shares or interests or property not the subject of such license.

215. If a lessee sublet, then, as the sub-lessee has not the whole estate which the lessee had, there will be no privity of estate between the lessor and sublessee, and because there is no privity of contract neither could formerly sue the other. If lessee sub-let, result.

216. Thus, if A., seized in fee, have demised to B. for a term, and B. have sublet to C. for part of the term, here A. at common law could never sue C. for the rent reserved, or on the covenants contained in the sublease. There is neither privity of contract nor estate between A. and C., which subsists only between B. and C. If B. assigned his reversion to D., the latter (D.) would, as assignee of B.'s reversion, be in privity with C., both as to estate and contract, and so entitled to sue C. both for rent and on the covenants of the sublease, which we have just seen above A. could not do. Now if B., instead of transferring his reversion to D., conveyed it to A. (his own lessor), by the doctrine of merger that reversion would be lost in A.'s greater estate, and would cease to exist. The result was, then, that A. could not, even after getting this assignment from B., sue C. by reason of want of any privity between them. The same consequences followed if B. purchased from Former law.

A. his (A.'s) reversion, for then A.'s greater estate equally met and merged the lesser estate of B., which thenceforth ceased.

Present law.

217. Both of these inconveniences are now remedied by the following sections (7 and 8) of the Landlord and Tenant Act (R. S. O. c. 143):

Apportionment of condition of re-entry in certain cases.

Where the reversion upon a lease is severed, and the rent or other reservation is legally apportioned, the assignee of each part of the reversion shall, in respect of the apportioned rent or other reservation allotted or belonging to him, have and be entitled to the benefit of all conditions or powers of re-entry for non-payment of the original rent, or other reservation, in like manner as if such conditions or powers had been reserved to him as incident to his part of the reversion in respect of the apportioned rent, or other reservation allotted or belonging to him.

Where the reversion expectant on a lease of land merges or is surrendered, the estate which, for the time being, confers as against the tenant under the same lease, the next vested right to the same land shall, to the extent of and for preserving such incidents to and obligations on the same reversion, but for the surrender or merger thereof would have subsisted, be deemed the reversion expectant on the same lease.

Effect of surrender or merger of reversion expectant on a lease in certain cases.

218. Section 7, above quoted, provides for severance of the reversion where the rent or other reservation has been apportioned, and gives the benefit of conditions or powers of re-entry for non-payment of original rent or other reservation, but does not extend to or

provide for re-entry in case of severance of the reversion for condition broken by assigning or subletting without leave, or otherwise than by non-payment of the original rent or other reservation. There is an English Act which covers this point (Conveyancing Act of 1881), but there is no Ontario statute to meet it. Therefore, if in Ontario a reversion is severed there can be no entry for anything except non-payment of rent.

Necessity for caution in assigning lease.

219. It will be seen from what we have said above, as to the continuing liability of the original lessee, and of his executors after his death, upon all the covenants contained in a lease to which he is a party, even although he has assigned over, that a lessee should be very cautious not to assign his lease to any but a responsible person, who is likely to perform the conditions of the lease. He should also be certain that he is thoroughly able to indemnify him against any future breaches of covenant which may be committed, and should obtain an indemnity in writing.

Assignment by tenant from year to year.

220. A tenant from year to year may, like a lessee, assign his interest. But he must recollect that he will be liable for the rent; and also for any waste which the person whom he thus substitutes as tenant may commit. Unless he make a profit rent by sub-letting, he

had much better, if possible, get the landlord to discharge him from his tenancy, and to accept the new tenant in his place. This arrangement, for the safety of all parties, should be reduced to writing.

Assignment for benefit of creditors.

221. Where there is an assignment for the benefit of creditors the following provisions have been passed (Ontario Acts, 1895, page 176) as to the liability of the insolvent estate to the landlord:

Lien of landlord for rent after assignment for benefit of creditors.

In case of an assignment for the general benefit of creditors the preferential lien of the landlord for rent is restricted to the arrears of rent due during the period of one year last previous to and for three months following the execution of such assignment, and from thence so long as the assignee shall retain possession of the premises leased.

Assignee may retain possession for remainder of term.

Notwithstanding any provision, stipulation or agreement in any lease or agreement contained, in case of an assignment for the general benefit of creditors, or in case an order is made for the winding up of an incorporated company being lessees, the assignee or liquidator shall be at liberty, within one month from the execution of such assignment or the making of such winding up order, by notice in writing under his hand given to the lessor, to elect to retain the premises occupied by the assignor or company as aforesaid, at the time of such assignment or winding up, for the unexpired term of any lease under which the said premises were held, or for such portion of the said term as he shall see fit, upon the terms of such lease, and paying the rent therefor provided by said lease. This section shall apply to assignments made after 16th April, 1895.

222. Under this section the assignee is given the right to retain the demised premises upon making his election in the prescribed manner, and the question of the right of forfeiture is not of much importance.

Effect of clause forfeiting lease on insolvency

223. Most written leases contain the statutory covenant that the lessee "will not assign or sublet without leave," and the provision that, "if the term hereby granted shall be at any time seized or taken in execution or attachment by any creditor of the lessee or his assigns, or if the lessee or his assigns shall make any assignment for the benefit of creditors, or becoming bankrupt or insolvent, shall take the benefit of any Act that may be in force for bankrupt or insolvent debtors, the then current quarter's rent shall immediately become due and payable, and the term shall immediately become forfeited and void." An assignment for the benefit of creditors by a tenant who holds under a lease with this clause would, except for the above section, give the landlord the right to eject, and this without preliminary notice of the breach; and acceptance of payment of arrears due before the making of an assignment would not be a waiver of the right of forfeiture.

Proviso for acceleration.

224. Such a proviso (called a proviso for acceleration) is not a fraud upon creditors.

Lessor after assignment cannot claim forfeiture by insolvency

225. The lessor, after a valid assignment of the term has been made, cannot take advantage of the fact that the original lessee has become bankrupt; nor can the assignee of part of the reversion enforce the right of forfeiture.

Distrainable effects necessary.

226. The landlord's right to preferential payment depends upon the existence of distrainable effects, and if there is nothing upon which a distress can be levied, the landlord ranks only as an ordinary creditor.

Distress not required to enforce right.

227. It is not necessary that a distress should, in fact, be made, and making a distress does not give the landlord any higher right, though if before an assignment is made the arrears are recovered by a distress, the landlord cannot be compelled to refund the excess over the statutory allowance.

Parties may contract themselves out of the Statute.

228. A clause that the section shall not apply is legal.

Breaches of covenant

229. If a tenant has been guilty of breaches of covenant, it will be difficult for the landlord to recover under the case of Grant v. West, 23 A. R. 533, which decides that claims for damages cannot be made against an

assignee under the Assignments and Preferences Act. Where valuable premises are leased, landlords had better require security from tenants, to provide for satisfaction for damage done to the premises in case an assignment should be made.

Effect of death of tenant.

230. On the death of a tenant his interest as such, whether he is a lessee or only a tenant from year to year, passes to his executor or administrator, who may at once be sued in his representative capacity for any rent that is due, or any breaches of covenant that may have been committed. If he has never entered into possession, or dealt with the premises in any way, he can discharge himself of all liability by showing (if such is the case) that the testator's estate did not yield sufficient assets to satisfy the demand. If, however, he have once taken possession, his position is much less favourable. He may then be sued in his personal capacity as an assignee. And if an action is brought against him for rent, he must apply the whole profits of the premises to meet the demand. If, however, they produce no profit, or less than the rent due, and he have no other assets of the testator, he should offer to surrender the lease, and if he do so, he may, it would seem, protect himself. But if he be sued on any of the other covenants, it seems very doubtful

whether he can save himself from personal liability, if he have ever taken the premises. Before he does so, therefore, he should make very careful enquiry into their value, and its sufficiency to protect him from all liability.

Marriage no effect on tenancy

231. Marriage of landlord or tenant has no result on their liability as such.

Inter-pleader by tenant.

232. The Judicature Act (Ontario Statutes, 1895, c. 12, s. 53, s.-s. 5), is as follows:

> In case of an assignment of a debt or other chose in action, if the debtor, trustee, or other person liable in respect of the debt or chose in action, shall have had notice that such assignment is disputed by the assignor, or anyone claiming under him, or any other opposing or conflicting claims to such debt or chose in action, he shall be entitled, if he think fit, to call upon the several persons making claim thereto to interplead concerning the same, or he may, if he think fit, pay the same into the High Court under and in conformity with the provisions of law for the relief of trustees.

Rent to accrue due will not be within this section; rent overdue will be within it. When, therefore, a tenant has to deal with two claimants for overdue rent he can pay it into Court under this section, and let them fight out their respective rights there.

CASES.

Assignment of lease.

Where a lease containing a covenant against assignment without the consent of the lessors is so assigned, the assignment containing a covenant by the assignee to pay the rent and indemnify the assignor, and the assignee goes into possession of the mortgaged premises, he is liable, although the consent of the lessors may not have been procured, to pay to the assignor rent accruing due after the assignment, which the latter has been obliged to pay:

Brown v. *Lennox*, 22 A. R. 442.

Severance of the reversion.

Upon a lease made pursuant to the Short Forms Act, containing a condition for re-entry on assigning or subletting without leave, when the lessor gives a license to assign part of the demised premises he may re-enter upon the remainder for breach of covenant not to assign or sublet, notwithstanding that the proviso for re-entry requires the right of re-entry on the whole or a part in the name of the whole.

Sections 12 and 13 of the Landlord and Tenant Act, R. S. O. c. 143, are to be read together, the former referring generally to all cases, and making licenses to alien applicable for that particular instance only, the latter referring to specific cases of licensing alienation of a part, and reserving the right of re-entry as to the remainder. Hence, where a lessor gave a license to alien part of the demised premises, it was held that the license applied to the licensed arrangements only, and that upon subsequent alienation without leave he might re-enter.

A tenant in fee simple conveyed land to the use of himself for life, and after his death to such uses as he might by will appoint. He with his grantees to uses then made a lease of the land, containing a covenant not to assign or sublet without leave, and a proviso for re-entry for breach of the covenant,

Assignment of lease.

and by will appointed the reversion to his seven children. After his death an assignment was made by the lessee without leave, and subsequently one of the devisees conveyed his undivided one-seventh interest to trustees to sell, lease or mortgage. An action was brought to recover the lands for breach of the covenant against assigning. Held, that by the conveyance of the undivided one-seventh share the reversion was severed and the condition destroyed, and therefore no recovery could be had for breach occurring before or after the severance:

Baldwin v. *Wanzer*, 22 O. R. 612.

Seizure under execution.

A mortgage of lease, after reciting the lease, granted and mortgaged to the mortgagees, a loan company, their successors and assigns forever, the lease, and the benefit of all covenants therein contained, and the land to be held for the term (less one day). Held, that the one day excepted might be taken as the last day of the term, and that the mortgagees were not assignees of the term and liable for the rent:

Jamieson v. *L. & C. Co.*, 16 C. L. T. 285.

Covenant to pay for buildings.

A condition in a lease, that in case any writ of execution should be issued against the goods of the lessee the then current year's rent should immediately become due and payable and the term forfeited, is personal to the original lessor and lessee and does not run with the land, and cannot be taken advantage of by the grantee of part of the reversion:

Mitchell v. *McCauley*, 20 A. R. 272

Held, that a covenant by a lessor (not mentioning assigns) to pay for buildings to be erected on the lands demised does not run with the lands, and the lessee or his assigns had no claim as against the land or the devisees of the lessor in respect of the value of buildings so erected:

McClary v. *Jackson*, 13 O. R. 310.

Covenant to pay for building on water lot.

A covenant by the lessor in a lease of a parcel of land covered by water to pay at the end of the term for "the buildings and erections that shall or may then be on the demised premises," does not bind him to pay for crib work and earth filling done upon the parcel in question, by which it was raised to the level of the adjoining dry land and made available as a site for warehouses:

Adamson v. *Rogers*, 22 A. R. 415.

Under 58 V. c. 26, s. 3 (s-ss. 4 and 5), the preferential lien for rent extends not only to a year's rent prior to the assignment for creditors, but to three months' rent thereafter, whether the assignee retains possession or not; and in case the assignee elects to retain possession, the landlord's lien extends for such further time after the three months as the assignee may so retain possession:

Clarke v. *Reid*, 16 C. L. T. 263.

Assignee can be distrained on.

The goods in possession of an assignee, under an assignment for benefit of creditors, are not in the custody of the law so as to protect them from distress:

Linton v. *The Imperial Hotel Co.*, 16 A. R. 337.

In this case the clause was as follows: Provided, if the term hereby demised or the goods on the demised premises shall at any time be seized or taken in execution or in attachment by any creditor of the said lessee, or if the said lessee shall make any assignment for the benefit of his creditors, or being insolvent, shall take the benefit of any Act that may be in force for bankrupt or insolvent debtors, or in case a default be made by the said lessee in any of the covenants or conditions therein, the then current year's rent shall immediately become due and payable, and may be distrained for; but in other re-

spects the said term shall immediately become forfeited and at an end, and the said lessors shall thereupon be entitled into and upon the said premises, or any part thereof, in the name of the whole to re-enter, and the same to have again, repossess and enjoy, as if these presents had not been executed. And it is hereby declared that the provisions of the Statute of Ontario, 50 V. c. 23, intituled an Act respecting Distress for Rent and Taxes, shall not apply to this lease.

Default was made in the quarterly payments of rent in advance, as also by an assignment, and the landlord then distrained. His action was upheld. because he had only taken steps to claim rent, not to claim possession. Where the term has been determined in consequence of a forfeiture and not by effluxion of time, the Statute of Anne is inapplicable.

If the term is gone, the landlord being unable to distrain as at common law or by virtue of the statute, the power of distress can only be regarded as a personal license to be executed on the tenant's own goods, and not upon property which has passed to the assignee. The clause is divisible, and the lessor may distrain for the rent so long as he has not elected to forfeit the term. If he elects to do that he loses his remedy by distress, and is perforce driven to recover the rent in some other manner.

CHAPTER XII.

WASTE.

To prevent waste, rights are either implied or founded on covenant.

233. The respective rights and liabilities of landlord and tenant in respect to the repairing of the premises, or to the commission of what the law terms waste, that is, the doing injury or damage, or permitting injury or damage to accrue to the estate, depend either upon the implied obligation which the law casts upon them when there are no covenants or agreements on the subject in the lease or other instrument by which the property is let, or upon the true meaning and construction of such covenants when they exist. I shall, therefore, consider this question with reference to these two states of circumstances.

Implied on part of landlord.

234. First, where there is no express covenant or agreement. In such a case the landlord is under no obligation whatever to repair the house, although its state may be such that the tenant can have no beneficial occupation of it, and even if it should fall and destroy the furniture in it, the landlord will not only be irresponsible for the damage thus sustained by the occupier, but will be entitled while the house is down, and whether he receive it or not, to insist upon being paid his rent to the

end of the term, if there is a lease; or if there is not, until the tenancy is determined by a proper notice to quit. With respect to lessee or tenant, the question is not quite so simple. The law implies on the part of every tenant promises or engagements (1) to use the property he occupies in a tenant-like and proper manner, (2) to take reasonable care of it. The first of these engagements may be violated by doing actual injury to the premises, and this the law calls voluntary waste, while the second will not be fulfilled if the tenant remains the passive spectator of decay and ruin, although doing nothing to accelerate it; yet, on the other hand, making no effort to retard the decay. Such absence of reasonable care, or, in other words, such neglect to do proper repairs, the law designates permissive waste.

On part of tenant.

Voluntary waste.

235. (1) As to voluntary waste: It will be voluntary waste if a tenant pulls down any part of the premises which he occupies; destroys any of the walls; removes or injures wainscotting, or destroys chimney-pieces, stoves or bells, or any of the landlord's fixtures; opens new windows or doors, or otherwise changes the form and arrangement of the house without the consent of the owner; nor must he, although it might improve the value of the premises, convert one species of edifice into another, as a dwelling-house into a shop, a watermill into a windmill, etc., etc. If he

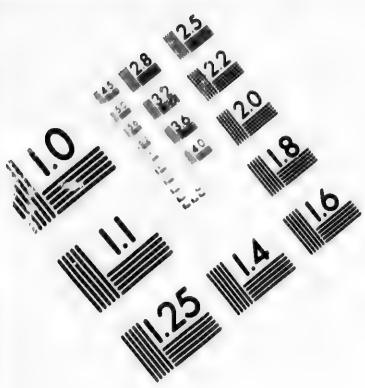
do these or similar acts he will be liable, whether he holds under a lease for a term of years or from year to year, to an action for damages at the suit of the landlord. He will also be restrained by injunction from proceeding with any such alterations. No alterations should, therefore, be made by a tenant without the express, and if it can be obtained, the written consent of the landlord.

(2) As to permissive waste, or the omission to make proper repairs. Permissive waste.

236. There is in the obligations to be fulfilled under this heading, considerable difference between tenants for years and tenants from year to year. It is not easy to say how far the liability of the first class (tenants for years) extends in the absence of any express agreement on the subject. The better opinion seems to be that such tenants should be obliged to do all the repairs, both substantial and ordinary, which may become necessary during their term.* In case of tenants for years.

237. A tenant from year to year, on the other hand, is not bound to do more than keep Tenant from year to year.

* Substantial repairs are those "to the main walls and other essential parts of edifices and the replacing of beams, girders, roofs and other main constructive timbers." Ordinary repairs are "common reparation to windows, shutters, doors, and the like."



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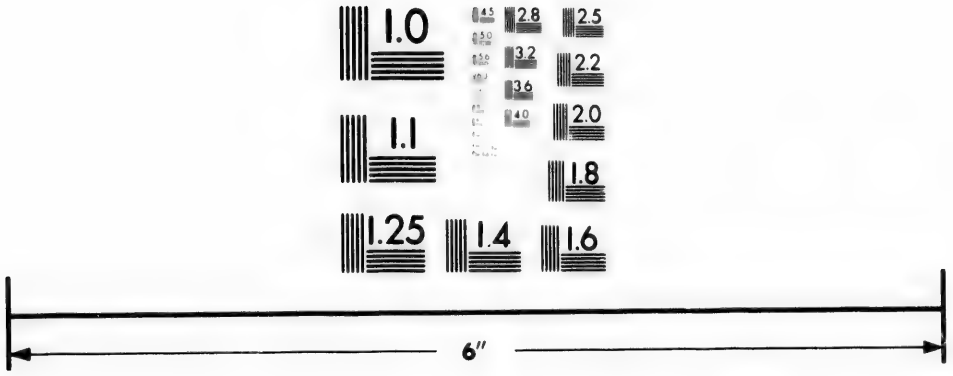

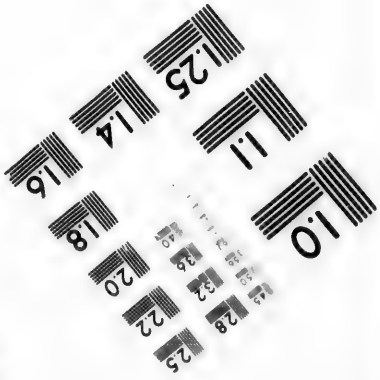

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the premises wind and water tight, when that can be done without substantial repairs, and generally to do repairs which fairly come under the head of ordinary. Even with respect to those parts of the premises which are the subject of ordinary repairs, regard must be had to their age and general state and condition when he took possession, for he is not bound to replace old, wornout materials with new ones, nor to make good inevitable depreciation resulting from time and ordinary wear and tear.

Express covenant.

238. When there is an express covenant or agreement.

Leases of houses generally contain a general covenant to keep and leave the premises in good repair, and there are also, in most cases, according to the agreement of the parties, particular stipulations with respect to the repair or treatment of specific portions of the premises. For instance, as to the painting of the house inside and outside once in so many years, as to the cleansing in the last year of the tenancy of all drains, cesspools, etc. The terms employed in framing these covenants vary according to the intention of the parties or the knowledge of the conveyancer employed. These covenants are nearly always entered into by a tenant, and it must be borne in mind that a covenant is

construed most liberally in favour of the person with whom and most strictly against the person by whom it is made.

Liability of lessee on covenant.

239. The liability of the lessee upon a covenant, that he will well and sufficiently repair and maintain the demised premises during his term, and deliver them up at the expiration thereof in good repair and condition, will depend upon the age and general condition of the house at the commencement of the tenancy. The jury must say whether or not the lessee has done what was reasonably to be expected of him, looking to the age of the premises on the one hand, and to the words of the covenants which he has chosen to enter into on the other; but where the tenant covenants to keep the premises in good repair, he is bound to put them into good repair, their age and the class of building being considered, and is not justified in allowing them to remain in bad repair for their age and class, because he has found them in that condition.

Inspection and survey of premises desirable.

240. This state of the law suggests the advisability of having the premises inspected and reported upon by a competent surveyor before the lease is signed, so that the best evidence may be forthcoming at the end of the term, if there is any dispute as to the extent of the dilapidation and the tenant's lia-

bility to make it good. If it is possible, it is well to have a joint survey on behalf of the lessor, and then if the result be put into writing, and its correctness assented to by both parties, the document embodying it may be used in evidence at any subsequent time.

Measure of repair.

241. When the tenant agrees to put or keep premises in habitable repair, he must put and keep them in such a state that they are reasonably fit for the occupation of a class of persons likely to occupy them.

Extent of covenant to repair.

242. A covenant to repair applies not only to buildings in existence when the lease was made, but to all erections made upon the premises during the tenancy.

Destruction of premises.

243. Under a general covenant to repair and leave in repair, a lessee, or the person to whom he assigns his interest, will be obliged to rebuild the house in case it should be totally destroyed by fire, flood, or tempest. What is more, he must pay rent, though he has lost the enjoyment of the premises. To avoid this hardship it is usual to introduce into the covenant to repair an express exception with respect to making good damage done by fire, flood or tempest. It is not uncommon also to stipulate for the insurance of the premises by the lessee, and to provide for

the application of the money received from the insurance office to the rebuilding of the premises, and also for the cession or abatement of the rent until that is completed. In Ontario the lessor generally insures the buildings.

(See on this subject chapter VI. above.)

Liability to action for damages.

244. With regard to remedies in cases of waste or non-repair, a person who fails or neglects his duty is liable to an action for damages. If there is an express covenant to repair by either lessor or lessee, he will be liable to an action, which may be brought if the premises are out of repair at any time during the term.

Right of landlord to inspect.

245. The landlord has no right, however, in the absence of any stipulation, to go upon the premises to inspect them and see their state. Hence, it is usual in leases expressly to give him the power to do so on a limited number of days in the course of the year, or any time on giving reasonable notice. It must be distinctly borne in mind that if the landlord agree to do repairs, his neglect to do them, into whatever state the house may fall, will not entitle the tenant to quit without notice before the expiration of his term; his only remedy is by action.

Proviso for re-entry.

246. It is usual to insert in the lease a proviso rendering it void in case the lessee should not perform covenants to repair.

Use of premises.

247. If a tenant is known to be about to commit serious waste, as, for instance, to pull down the house or convert it into a shop, the Court, if notified, will interfere by injunction to restrain him. If the party has already commenced operations, in this case also an injunction will be granted, pending the decision of an action for damages, which the plaintiff may institute at the same time as his application for an injunction.

CASES.

Collecting stones.

A tenant who, for the purpose of rendering the land more fit for cultivation collects the stones therefrom, has the property in the stones, and the landlord has no interest in them, and is liable for their value if he disposes of them:

Lewis v. *Godson*, 15 O. R. 252.

A lease was silent as to any right of the lessee to bore for oil. Held, that *prima facie* the lessee had not the right to bore for oil:

Lancy v. *Johnston*, 29 Ch. 67.

You must not clear a man's land without his consent

In an action by reversioner against tenant for injury to the reversion caused by cutting down and carrying away trees and underwood, defendant pleaded his tenancy under a demise from D. for 19 years, that it was wild land, and that he cleared it, and thereby improved its value. Held, no defence:

Drake v. *Wigle*, 22 C. P. 341.

Effect of removal of fence by plaintiff, with defendant's consent or direction: Removal of fence.

Pickard v. *Wixon*, 24 U. C. R. 416.

It is a question for the jury whether the tapping of trees for sugar-making has the effect of destroying the trees, or of shortening their life, or injuring them for timber purposes; and, if so found, a covenant not to cut down timber, except for the lessee's use or for purposes of improvement on the premises, will be broken by such tapping: Tapping of trees.

Campbell v. *Shields*, 44 U. C. R. 449.

By a lease under seal the defendant rented from the plaintiff certain premises for three months. The lease contained a covenant that the lessee was not to use the premises for any purpose but that of a private dwelling and "gents' furnishing store." Held, that the carrying on by the lessee of auction sales of his stock on the premises was a breach of the covenant, restrainable by injunction: Injunction to prevent waste.

Cockburn v. *Quinn*, 20 O. R. 513.

A lessee covenanted to use upon the demised premises all the straw and dung which should be made thereupon. Held, that the lessor was entitled to recover for manure removed from the premises, which was there at the expiry of the term, but not for manure made thereafter while the tenant was overholding:

Elliott v. *Elliott*, 20 O. R. 134.

CHAPTER XIII.

FIXTURES AND EMBLEMENTS.

"Fixtures" explained.

248. Whatever is attached to the freehold (i.e., either to the soil or the fabric of a building) becomes thenceforth part of it, and cannot be removed, unless it is what is called a "fixture." For our present purpose fixtures may be defined to be personal chattels which have been annexed to land or a house, but which may afterwards be severed and removed by the party who has annexed them, or his personal representatives, without the consent of the owner of the freehold. When an article is annexed to the soil or to the building, and is legally irremovable, it ceases to be a "fixture," and becomes part of the freehold.

Requisites for annexation to freehold.

249. The first question that suggests itself is, what is meant by being "annexed"? for of course, if there is no annexation, the thing, whatever it may be, remains a mere chattel, and can be removed like other goods and effects.

250. Now, the size, weight or character of the thing does not affect the question, for in one case it was held that a granary resting

by its mere weight upon pillars built into the land, was not a fixture, but a mere chattel. To constitute a fixture, it is necessary that the substance should be let into the soil or the fabric of the house. A slight fastening will not suffice. Whether there is such an annexation to the freehold as to deprive it of the character of a movable chattel, depends principally on two considerations: first, the mode of annexation to the soil or fabric of the house, the extent to which it is united to them, and whether it can easily be removed without injury to itself or the fabric of the building; and, secondly, on the object and purpose of the annexation, whether it was for the permanent and substantial improvement of the dwelling or merely for a temporary purpose, or the more complete enjoyment and use of it as a chattel.

Tenant's fixtures.

251. But suppose an article has been unquestionably annexed to the freehold by the tenant, under what circumstances is it removable by him? is it, in fact, a "tenant's fixture"? Tenants' fixtures are of two kinds, namely, irremovable fixtures and removable fixtures. It seems to be a contradiction of terms that a thing can be a fixture and yet be removable, but it is one of those contradictions which are more apparent than real. While it was on the premises it was a fixture, when it is taken away it is a fixture no longer.

Irremovable fixtures.

252. The first class of fixtures comprises all such things as may be affixed to the freehold, the property in which passes to the landlord immediately upon their being affixed, and at the same time the tenant ceases to have any property in them, such, for example, as doors and windows; and all such things as may be placed on the freehold though not affixed to it save by their own weight, the property in which passes to the landlord immediately upon their being so placed, and the tenant at the same time ceases to have any property in them, such, for example, as ordinary rail fences.

Movable fixtures.

253. The latter class comprises all such things as may be affixed to the freehold for the purposes of trade or of domestic convenience or ornament, a qualified property in which remains in the tenant, and which are neither lands under the 4th section nor goods under the 17th section of the Statute of Frauds,* but may be sold under execution, and which the tenant may remove at any time during his term, or, it may be, within a reasonable time after its expiration; and all such things as may be affixed to the freehold for merely a temporary purpose, or for the more complete enjoyment and use of them as chattels, the absolute property in which remains

* *Lee* v. *Gaskell*, 1 Q. B. D. 700.

in the tenant, and which remain chattels, and may be removed by the tenant at any time.

254 These two classes are quite distinct, and the term "fixtures" is properly applicable to the first class, for the fixtures in that class are fixtures in the primary sense of the term.

255. The fixtures in the second class are fixtures only in a secondary sense of the term; but they have acquired, though not exclusively, the name of fixtures, although it can hardly be said to be an appropriate name for them.

Fixtures as used in Short Form Covenant.

256. The term "fixtures," as used in the covenants to repair, and to leave the premises in good repair, in the short forms of leases, is used only in the primary sense of the term, and includes, therefore, only fixtures of the first class, and does not include any fixtures of the second class.

257. The Legislature, in prescribing a form of lease for general use, did not intend to provide that where a tenant affixed things to the freehold for the purposes of trade or of domestic convenience or ornament, or for their temporary or more convenient use, he should keep such fixtures in repair, and should surrender them to the landlord at the end of the term.

258. Any doubt there may have been as to the extent over fixtures of the covenants to repair, and to leave the premises in good repair, has been removed in all leases according to the short form executed after the 16th April, 1895, as will be seen by reference to the amended form already printed.

259. It will still be necessary to distinguish what articles the term tenant's fixtures includes. A list could be furnished of the articles which have been held to be, or not to be, removable fixtures. But such a list is of doubtful utility, because in many cases the decisions which are applicable to one man's advantage are not so to another.

Shrubs, plants, flowers, become annexed to.

260. Thus, if a private person plant any trees, shrubs, box borders, or flowers in his orchard or garden, they immediately become annexed to the freehold, and are thenceforth irremovable. On the other hand, the same things planted for sale by a nurseryman in the course of his business may be taken and sold. I leave, therefore, the general principles above stated in the reader's hands as sufficient. If there is a dispute worth fighting over, which he cannot satisfactorily and justly settle by appeal to these principles, he must consult a solicitor.

Covenants as to fixtures.

261. We have hitherto considered the respective rights of the landlord and tenant as they stand in the absence of any agreement

on the subject of fixtures, but, of course, they may be varied by any implied agreement, and still more by any express agreement, either in a covenant of a lease or otherwise; and this, too, although they are not mentioned by name. For instance, a person who covenants to keep in repair all erections "built and thereafter to be erected and built," cannot remove even trade fixtures. And where a party covenanted to leave a water mill with "all fixtures, fastenings and improvements," these words were held to include a pair of new mill-stones which he set up during his tenancy, although by custom they might have been removed.

When fixtures must be removed.

262. A tenant must remove his fixtures either during his term, allowing a reasonable extra time for removal if necessary, or during such time as he may hold possession after his term in the capacity of a tenant; for instance, while he holds on after his term under circumstances from which a tenancy from year to year would be implied; but if he quit possession, or if he retain it against the will of his landlord, his right to take away fixtures is gone; and even if the tenant, having erected fixtures which he would be entitled to remove during his term or at its close, renew his lease, he must take care to reserve his right to remove the fixtures which he was entitled to sever during his first tenancy, otherwise, being

on the premises previous to the commencement of the second term, they will be irremovable when it expires.

Fixtures purchased.

263. A tenant has, at the end of his occupancy, the right to remove any fixtures which he purchased from the landlord at its commencement.

Fixtures as between outgoing and incoming tenants.

264. The right to remove or to sell the fixtures, as between the outgoing and the incoming tenant, is governed by the same principles as prevail between landlord and tenant. Where, however, fixtures are valued for the purpose of sale, between successive tenants, it is desirable that the landlord should be a party to the bargain. And this for two reasons: In the first place, the old tenant might otherwise overreach the new one by selling fixtures which he had neither erected nor bought, and which were therefore not his; and in the second place, if the transaction took place without the landlord's concurrence it would be open to him afterwards to contend that fixtures which the first tenant had erected, not having been removed before he left, had become part of the premises; that the second tenant had taken them from him (the landlord) as part of such premises, and that he had, therefore, no right to sever them. If the incoming purchase from the outgoing tenant fixtures which are the property of the

landlord, he may recover back any money he has paid for them.

Fixtures allowed to remain on premises.

265. When premises are left vacant it sometimes happens that the outgoing tenant obtains permission from the landlord to leave his fixtures in order, if possible, to sell them to the incoming tenant, when such shall be found. Great caution is, however, requisite in such an arrangement, for if the landlord were to let a new tenant into the premises before he had purchased the fixtures the latter might afterwards insist on retaining them, since neither the old tenant nor the landlord would then have the right to enter on the premises in order to remove them.

Damage caused by removal to be made good.

266. Where trade or domestic and ornamental fixtures are removed, the tenant must make good any damage sustained by the premises from the act of removal, and where a fixture has been put up in substitution for an article existing at the time the tenancy commenced, the tenant, on taking down his own fixtures, is bound to restore the former article or replace it by one of the same description.

267. If a tenant mortgage his lease, the right to his fixtures passes to the mortgagee.

Remedy for improper removal.

268. The remedy for the improper removal of fixtures by the tenant, or the improper detention by the landlord, is by action, either in

the Superior or County Court, according to the damage claimed.

Emblements.

269. The tenant's right to emblements is the right which the law gives to the tenant if lands let for the purpose of cultivation, either for an uncertain term or for a term which unexpectedly came to an end by the cessation of the interest of his superior landlord, to take away the crops (yielding an annual return, as wheat, barley, etc.), which were growing on the land at the end of his tenancy. Most farm leases are drawn to provide that the tenancy commences either at the end or the beginning of the agricultural season, or, if there is no lease, the doctrine of emblements applies.

What covered by.

270. The doctrine of emblements extends not only to corn sown, but to roots planted, or other annual artificial profit; but it is otherwise of fruit trees, grass and the like, which are not planted annually at the expense and labour of the tenant, but are either a permanent or natural profit of the earth. For when a man plants a tree he cannot be presumed to plant it in contemplation of any present profit, but merely with a prospect of its being useful to himself in future, and to future successions of tenants.

271. Where the term of tenant for years depends upon a certainty, as if he holds from midsummer for ten years, and in the last year he sows a crop of wheat, and it is not ripe and cut before midsummer, the end of his term, the landlord shall have it, for the tenant knew the expiration of his term, and therefore it was his own folly to sow what he never could reap the profits of. Term certain.

272. But where the lease for years depends upon an uncertainty, as upon the death of the lessor, being himself only tenant for life; or if the term of years be determinable on a life or lives; in all these cases the estate for years not being certain to expire at a time foreknown, but merely by the act of God, the tenant or his executors shall have the emblements in the same manner that a tenant for life or his executors shall be entitled thereto. Not so if it determine by the act of the party himself; as if tenant for years does anything that amounts to a forfeiture, in which case the emblements shall go to the lessor and not to the lessee, who hath determined his estate by his own default. Term uncertain.

273. If a tenant at will sows his land, and the landlord, before the wheat is ripe, or before it is reaped, puts him out, yet the tenant shall have the emblements and free ingress, egress and regress to cut and carry away the Tenant at will.

profits; and this for the same reason as all emblements turn, viz., the point of uncertainty, since the tenant could not possibly know when his landlord would determine his will, and therefore could make no provision against it; and having sown the land, which is for the good of the public, upon a reasonable presumption the law will not suffer him to be a loser by it. But it is otherwise, and upon reason equally good, where the tenant himself determines the will, for in this case the landlord shall have the profits of the land.

Tenant by sufferance.

274. Tenants by sufferance are not entitled to emblements.

CASES.

Away-going crops.

Where there is a stipulation in a lease for a term certain, that the lessee shall deliver up all the lands at the expiration of the lease, all question as to customary right to the away-going crops is excluded. Apparently, there is no custom of the country as to away-going crops in Ontario:

Burrowes v. *Cairns*, 2 U. C. R. 288.
Kaatz v. *White*, 19 C. P. 36.

Trade fixtures.

An engine and boiler put into a carpenter's shop and manufactory of agricultural implements: Held, to be trade fixtures as between landlord and tenant, and to be removable by the tenant:

Prongney v. *Gurney*, 37 U. R. C. 347.

Tenant's fixtures.

The right of the tenant to erect fixtures is to this extent, viz.: That they shall not be such as to

diminish the value of the demised premises, nor to increase the burden of them as against the landlord, nor to impair the evidence of title.

Fixtures. The term fixtures is used in the extended form of covenants to repair, and leave premises in good repair, in a lease made under the Short Forms Act, includes only irremovable fixtures, which are such things as may be attached to, e.g., doors and windows, or placed on, e.g., rail fences, a freehold by a tenant, the property in which passes to the landlord immediately upon their being so affixed or placed, and in which the tenant at the same time ceases to have any property; and does not include removable fixtures, which are such things which may be affixed to the freehold for the purposes of trade, or of domestic convenience or ornament, an equitable property in which remains in the tenant, or such things as may be affixed to the freehold for merely temporary purposes, or for the more complete enjoyment and use of them as chattels, the absolute property in which remains in the tenant.

Where a lessor has elected to re-enter for a forfeiture, the lessee has the right while he remains in possession to remove fixtures put up by him for the purposes of his trade, and has a reasonable time after such election within which to do so:

Argles v. *McMath*, 26 O. R. 224.

Where a trade fixture is attached to the freehold it becomes part thereof, subject to the right of the tenant to remove it if he does so in proper time; in the meantime it remains part of the freehold:

Scarth et al. v. *The Ontario Power and Flat Co.*

CHAPTER XIV.

HOW A TENANCY MAY BE DETERMINED, AND CONSEQUENCES OF HOLDING OVER.

Premises held for a term certain.

275. If premises are held on lease for a term certain, the tenancy, of course, determines at its expiration without the necessity for any notice to quit or other procedure on either side. And this is also the case where the tenant holds merely under an agreement for a lease. But besides this regular expiration of a tenancy, it may be terminated by some default or misconduct on the part of the tenant; by a voluntary agreement between landlord and tenant; or, if its nature will admit of it, by a regular notice to quit given by either party. We have already seen what is necessary where a power of re-entry for breach of covenant is reserved.

Disclaimer

276. A tenant will incur a forfeiture of his interest, and may be immediately ejected if he denies or "disclaims" the title of his landlord, and asserts that the property belongs either to himself or to strangers. But if the property changes hands, and then rival claimants appear, and the tenant refuses to pay rent to any until it is settled who is

entitled, that will not amount to such a "disclaimer" or denial of the title of the true owner as will enable him to eject the tenant. Nor can a lease for a term of years be forfeited by mere spoken words. And a distress put into premises for rent which accrued due after an alleged "disclaimer" is considered to waive it, and to restore the tenant to his former position.

Surrender.

277. "Surrender" is when the tenant yields up the premises to the landlord, and the landlord accepts them back from him. Of course, it is unnecessary to say that the landlord's acceptance is quite optional. A tenancy for a term of more than three years, as it can only be created by a lease under seal (i.e., a deed), so it can only be surrendered either expressly by deed, or impliedly by the lessee's accepting from the landlord a new lease. The rule is less strict as to tenancies not created by deed. But even a tenancy from year to year cannot be surrendered and put an end to so as to bind either party, merely by the tenant's verbally stating his readiness to quit, and the landlord's verbally giving him leave to go. The surrender and acceptance should be in writing. Where, indeed, there was a verbal agreement between the landlord and a tenant from year to year (under a written agreement), that the tenancy should be determined; this, followed by the departure of

the tenant, and by the entry and possession of the landlord, was held to amount to surrender by operation of law. And the same has been also held in a case where, under similar circumstances, there was an agreement between the landlord, the tenant and a third party to substitute such third party as the tenant, and this was carried out by the old tenant quitting and the new one entering. And it may be said generally, that where there is an agreement between the landlord, the tenant and a third party, that the tenant shall leave, and that the third party shall come in as the tenant of the landlord, and then the possession of the premises is immediately changed in pursuance of the agreement; this will amount to a surrender of the original holding, and the first tenant will be discharged from liability on account of rent. But, as it will be necessary to make out, both that there was an agreement of the kind we have mentioned, and that there was a change of possession in consequence and in pursuance of it, and as doubts are very likely to arise as to the precise nature of what passed on the occasion of the alleged agreement, parties cannot be too strongly advised not to trust to such loose and irregular modes of putting an end to tenancies, and to adopt the only regular course, and have a proper written memorandum drawn up and signed whenever a tenant surrenders his tenancy, or one tenant is, with

the assent of the landlord, substituted for another. Under no other circumstances can a tenant feel perfectly safe that, on giving up the premises, he is released from responsibility to his landlord.

Notice to quit.

278. No notice to quit is necessary where premises are let for a term certain, expiring on a fixed day. Where there is a tenancy from year to year, in the absence of any special agreement on the subject, it can only be terminated by a notice to quit on either side; such notice being given six months before the expiration of the current year of tenancy. The notice is to be half a year, not six months; it must be a full half year, and thus, not 182 but 183 days.

Notice to quit in case of weekly or monthly tenancies.

279. The law in respect to notices to quit is now as well settled in the case of tenants for periods of less than a year, as in that of yearly tenants. In the latter case the law, in the absence of an agreement to the contrary, as just stated, implies an agreement for six months' notice. In the former case, at common law, it was doubtful whether the law would imply an agreement for any notice at all, but by statute of the Province of Ontario,*

* In case of tenancies from week to week and from month to month, a week's notice to quit and a month's notice to quit respectively, ending with the week or the month, as the case may be, shall be deemed sufficient notice to determine respectively a weekly or monthly tenancy: R. S. O. c. 143, sec. 15.

if the hiring be from half year to half year, a half year's notice must be given; if from quarter to quarter, a quarter's notice; if from month to month, a month's notice, and if from week to week, a week's notice. If a lodger quits his premises without giving notice, he must pay from six months' to a week's rent, according to his hiring. No notice is required where the tenant or lodger takes the premises for a term certain, and quits at the expiration thereof. On the other hand, there is no question that a party who enters for a month, week, etc., will be bound to remain until the termination of it, or, at any rate, to pay for it.

Tenant holding over.

280. If a tenant holds over after the expiration of his tenancy, paying double rent, under 11 Geo. II. c. 19, no notice to quit is necessary on either side. Nor need a mortgagee give notice to quit to any tenant who became such without his consent subsequently to the mortgage; but he may at once proceed to bring an action for possession of the land. It is not necessary that a notice to quit should be in writing, unless the parties have expressly stipulated that it should be so. A landlord, however, who has given notice to his tenant, will not be able to claim double rent from him unless such notice was a written one. And there can be no doubt that the notice should in all cases be a written one, so that its contents may be readily proved, and their sufficiency established.

Agent giving notice to quit.

281. An agent merely employed to receive rents has no implied authority from his principal to give a notice to quit; but an agent entrusted with the general management and letting of the property has. He must have authority at the time the notice was given; for a subsequent ratification by the landlord will not make valid a notice originally given without authority. A notice to quit signed by one of several partners, who are either landlords or tenants, will be sufficient; but it would be better that it should, if possible, be signed by all.

Requisites for notice.

282. A notice to quit must be clear and peremptory in its terms. If it is optional, giving the tenant the choice of going or of paying an increased rent, as, "I desire you to quit or else that you agree to pay double rent," it would be insufficient. But if the notice holds out the payment of double rent, not as an alternative, but as a penal consequence, which under certain statutes will attend the tenant's holding over, such a notice will be good.

Service of notice.

283. A notice to a tenant to "quit all the property you hold of me," is a sufficient description of the demised premises; and any general description applicable to the whole of the property will suffice. Even a description to a certain extent erroneous will not vitiate a notice if it do not mislead the party to whom it is given.

When to be given.

284. If a notice is handed to the tenant himself, it is not necessary that it should have a written direction or address; and if a notice is directed to the tenant by a wrong Christian name, and he keep it and do not send it back, he will be held to have waived the misdirection, and the lessor may enforce the notice, if there was no other tenant of the same name. A notice addressed to, and served upon, a tenant in actual possession will be sufficient. But where the person in possession is a mere servant of the true tenant, although the notice may be left with the servant, it must be addressed to the master. And if the notice be given to such servant, or if it be left, as it may, with a servant of the tenant at his dwelling-house, the person must be expressly told that it is a notice to quit, and must be desired to deliver it to his or her master. Notice to quit served upon a wife, on premises held by her husband, is sufficient. And where a notice to quit was put under the door of the house, but it was shewn that it had come to the hands of the tenant before the time at which it was necessary that it should be given, it was held that a sufficient service was proved. If a tenant give his landlord too short a notice to quit, the landlord, although he at first acquiesces in it, may ultimately refuse to accept it.

285. If a tenant's rent is always paid at a quarter, half year or year, the notice to quit

must determine on the anniversary of the day on which he entered.

286. If premises are let on an agreement that either party may determine the tenancy by a quarter's notice, such notice must expire at the period of the year when the tenancy commenced; but where it is said that the tenant "is always to quit," or "may always quit" at three months' notice, this may be given so as to expire either on the same day of the year on which the tenancy commenced, or at the expiration of any three months.

When commencement of term doubtful.

287. Sometimes a landlord is doubtful on what day a tenancy ends. In that case, if it is known that it must end on one of two or three days, a notice may be given to leave on such a day of the two or three (naming them) as the tenancy ends, taking care that the notice is given six months before the first, and then after the last day named, if the tenant have not quitted, the landlord will be justified in taking steps to eject him. Under these circumstances, or where still more uncertainty prevails, a notice to quit on a day named, or, "at the expiration of the year of the tenancy which will expire next after half a year from the time of the service of this notice," will be perfectly good. But, if nothing is known as to the time at which a tenancy commenced, it will not be safe to take any proceedings to

recover possession until the expiration of a year from the day on which the notice is served—for it is obvious that the tenancy might have commenced on the very day of the year on which the notice was served; and upon that supposition—which is the most unfavourable for the landlord that can be made—it would terminate on the anniversary of the service.

Tenant bound by his own replies.

288. If, however, where the commencement of the tenancy is uncertain, the landlord applies to the tenant for information, the latter will be bound by his answer, and if he name a day, and a notice to quit is given accordingly, he cannot afterwards be permitted to show that his holding did, in fact, begin on a different day.

When house and land let from separate dates

289. When a house and land are let together at one rent, but are to be entered upon at various times, then (as different notices cannot be given for separate portions of premises held at one rent) the notice to quit must (in the absence of any express agreement) expire on the day upon which the tenant entered on that part of the premises which forms the principal subject of the letting; and it is a question for the jury which is the principal subject.

Acceptance of rent.

290. If a landlord should accept rent accruing due after the expiration of his notice to quit, this will be treated as a waiver of the notice, unless the landlord at the time declare, or circumstances then occurring show, that he did not intend it to operate as such, or unless fraud or contrivance were practised upon him by the tenant in making the payment.

Distraining for rent.

291. But if the landlord distrain for rent accruing due subsequently, that will be an absolute waiver of the notice, and set up the tenancy again.

Second notice to quit.

292. A second notice to quit is a waiver of the first; unless, indeed, it is merely a warning given after the expiration of a proper notice, that if the tenant do not quit forthwith, or in so many days, he will be called upon for double value.

Retention of possession.

293. And if a tenant retain possession of the premises after the expiration of a notice to quit given by him, such retention of the possession will in general amount to a waiver of his notice. The landlord may, however, compel him to adhere to his notice, or pay double rent.

Tenant at will or tenant by sufferance.

294. In actions for possession of land it is often necessary to determine whether the defendant is tenant at will or by sufferance.

When a man is tenant at will he cannot be ejected without a determination of the tenancy by notice to quit, or demand of possession, or other act sufficient for that purpose. If he is a tenant by sufferance there is no necessity for such steps prior to the action.

Peaceable delivery required.

295. At the expiration of a tenancy, or its determination by notice to quit, the tenant must peaceably deliver up to the landlord the premises which had been let or leased to him. If he do not, his full responsibilities as tenant will continue; measures may be taken for his expulsion; and he will also be liable—as a penalty for holding over—to the payment of double value or double rent, so long as he continues in possession.

Double value.

296. By the 4 Geo. II. c. 28, s. 1, it is enacted that if any tenant or tenants for lives or years, or any person or persons coming in under or in collusion with them, hold over any lands, tenements or hereditaments, after the determination of their estates, and after demand made, and notice in writing given for the delivery of the possession thereof by the landlord, or the person having the reversion of or remainder therein, or the agent thereunto lawfully authorized, such tenant or tenants so holding over shall pay to the person so kept out of possession, at the rate of double the yearly value of the lands, tenements, or

hereditaments so detained, for so long a time as the same are detained.

297. This Act, as it will be seen, applies only where notice to quit is given by the landlord. Now the regular and ordinary notice to quit will, in the case of a tenancy from year to year, operate as a notice and demand under this Act. But a notice is requisite to enable the landlord to avail himself of the Act, even where the tenant holds for a term of years. Such notice may be given at any time either before or after the end of the term (provided that the landlord has not, by receipt of rent or otherwise, recognized a new tenancy from year to year). In the first case it will operate (in case there is any holding over) directly the term expires; in the second from the time it is served on the tenant.

Act applies only where notice to quit is given.

298. The Act does not apply to tenancies for a shorter term than from year to year; nor to instances in which the tenant retains possession under a fair claim of right.

299. The double value cannot be recovered by distress, but it may by an action in the High Court or (if the amount claimed be not too large) in the County Court. The tenant cannot deprive the latter Courts from jurisdiction by merely alleging that he has some claim to the premises, if it can be proved that he

has admitted that he was tenant at the time the holding over commenced.

Double rent.

300. Another statute applies where the tenant himself gives notice and then holds over. By the 11 Geo. II. c. 19, s. 18, it is enacted that in case any tenant or tenants shall give notice of his or their intention to quit the premises, and shall not accordingly deliver up the possession thereof at the time in such notice contained, then the said tenants or tenant, his or their executors or administrators, shall from thenceforth pay to the landlord double the rent, or a sum which he, she or they should otherwise have paid. This statute only applies to cases where a tenant has, from the nature of his holding, the power to give a notice to quit, and where he has, in fact, given a valid notice. It does not, like the 4 Geo. II. c. 28, render a notice in writing necessary. And also, unlike that, it apparently extends to the case of weekly, monthly and quarterly tenancies.

How recoverable.

301. The double rent payable under this Act may be recovered by distress, as well as by action in the High Court or County Court.

302. A tenant who holds over for a year after the expiration of a notice to quit—paying double rent—may then leave without giving a new notice.

CASES.

Requisites for a surrender.

The surrender of a term must, under the Statute of Frauds, be in writing, signed by the party surrendering, or by operation of law.

Surrender of lease may be implied.

The giving up and cancelling the lease by the tenant, though not of itself a surrender of the term, is yet a strong circumstance to be considered:

Burr v. *Denison*, 8 U. C. R. 185.

An unexpected result of a fraudulent conveyance transaction.

A conveyance in fee from a lessor to his lessee during the term, though made to defraud creditors, is, as between the lessor and lessee, a surrender of the term, and (among other consequences) entitles a purchaser at sheriff's sale of the lessor's estate in the land to immediate possession:

McPherson v. *Hunter*, 4 U. C. R. 449.

Another instance of a surrender in law.

Where a tenant, with the knowledge and consent of his landlord, takes a lease from another to whom the landlord has transferred his reversion, this amounts to a surrender in law, and the right to distrain is gone:

Lewis v. *Brooks*, 8 U. C. R. 576.

No surrender.

For detailed circumstances (even giving up the key) which were held not to be a surrender in law:

See *Carpenter* v. *Hall*, 16 C. P. 90.

No surrender.

Acts relied on as shewing the acceptance by the landlord of the surrender of a lease, and as effecting a surrender by operation of law, must be such as are not consistent with the continuance of the term; and using the key left by the tenants at the landlord's office, putting up a notice that the premises are to let, making some trifling repairs, and cleaning the premises, are ambiguous acts, which are not sufficient for this purpose:

Ontario v. *O'Dea* 22 A. R. 349.

Surrender.

The doctrine of surrender, by act and operation of law, applies as well to a term created by deed as to one created by parol:

Gault v. *Shepard*, 14 A. R. 203.

A disclaimer by tenant of landlord's title ends his tenancy.

A disclaimer by a tenant of his landlord's title at once puts an end to an existing tenancy, and an action for possession of the property may be at once maintained without notice to quit:

Claus v. *Stewart*, 1 U. C. R. 512; *Nugent* v. *Hessell*, 2 U. C. R. 194.

See *Daniels* v. *Weese*, 5 U. C. R. 589; *Bouter* v. *Fraser*, 4 O. S. 80; *Peers* v. *Byron*, 28 C. P. 250.

But he may dispute title on ground of fraud or misrepresentation:

Lynett v. *Parkinson*, 1 C. P. 144.

Denial of landlord's title.

In an action for possession by a landlord against a tenant whose term had expired: Held, that the defendant was not precluded from setting up that the plaintiff's title expired, or was put an end to, during the term; and to raise such defence it was not necessary for the tenant to go out of and then resume possession:

Kelly v. *Wolff*, 12 P. R. 234.

CHAPTER XV.

TENANT'S REMEDY FOR WRONGFUL OR IRREGULAR DISTRESS.

303. If a distress is improperly or wrongfully made a tenant has several remedies. As they vary according to the nature of the wrong committed, it is convenient to discuss them under the three heads: Tenant's remedy.

1. Irregular distress.
2. Excessive distress.
3. Illegal distress.

304. Irregular distress. This is where, although the right to distrain exists, the distrainor has been guilty of irregularity in taking such things as are not lawfully subject to distress, or in not conducting himself with propriety in his subsequent disposition of them or conduct respecting them. For instance, if emblements are taken; if growing crops are sold before they are ripe; if goods liable to seizure are sold without appraisement; if a landlord, having distrained sufficient to satisfy the arrears of rent, abandon the distress, and afterwads distrain again for the same rent; if a landlord sells goods after Irregular distress.

replevin by the claimant, of which he has had notice; if he turns the tenant or his family out of possession, and retains possession of the premises in which the goods are impounded for an unreasonable time, all these are irregularities for which a tenant who is aggrieved may bring an action in either the County Court or the High Court of Justice, according to the damages claimed. The damages will be confined to the actual injury suffered, and if an action is brought for an irregularity from which no real inconvenience or loss has resulted, not only will the jury be directed to return only nominal damages, but the plaintiff will very probably be refused his costs. Further, if adequate amounts have, in the opinion of the jury, been tendered before action brought, it will not lie at all, and the plaintiff will have to pay the costs.

Landlord's responsibility for acts of bailiff.

305. Even when an irregularity has been committed in levying the distress, it does not follow that an action can be brought against the landlord. He is not responsible for the acts of a bailiff or agent, who has clearly exceeded or departed from his authority, unless the landlord has subsequently ratified the very acts done.

Excessive distress.

306. Excessive distress. This is where the landlord has distrained the goods and chattels of the tenant to an amount beyond what is

fairly necessary to cover the rent in arrear and the costs of levying the distress. To make a distress excessive a landlord must have an opportunity of levying on goods, the value of which is about the amount of the rent in arrear, and therefore, if there is only one article on the premises, the landlord may safely take it. However small his demand and however valuable the article, it will not be excessive distress if its value be nearer than that of any other article there to the sum in arrears. Neither will an action for excessive distress lie where the excess is trifling. It must be something substantial and obvious. If there has been, however, such an excessive distress, an action will lie in which the tenant may recover as damages the value of his goods, less the amount of rent due. In considering whether the distress was excessive the jury will be told to consider what the goods seized would have sold for under execution on bailiff's sale. No action will lie merely on the ground of a landlord or bailiff having claimed more rent than was actually due, unless the goods taken and sold in regard to the real value, or unless some specific damage resulted from the exorbitant nature of the claim made, as, for instance, if it could be proved that it deterred the tenant's friends from joining with him as sureties on a replevin bond.

Illegal distress.

307. Illegal distress. A distress will be illegal if there was no right at all to make any distress whatever; for instance, if there was no tenancy between the distrainor and the person distrained upon; if there was a tenancy, but upon no certain rent; if the tenant was holding over after the expiration of notice to quit on the landlord's part; if the landlord's title had expired before the rent became due; if no rent was in arrear, or if the landlord's title to it had been barred by the Statute of Limitations; if the tenant has paid the rent, either on account of taxes which he was not liable to pay under his covenant, or under compulsion, to a superior landlord or to a mortgagee, for any of these causes, a distress will be wholly and absolutely illegal. If a tender is made after a distress has been taken, but before it is impounded, that makes any subsequent detention illegal. When the goods have once been impounded a tender will have no effect, and a landlord may proceed to sell without rendering himself liable to any action.

Tenant may recover double the value of goods sold.

308. If an illegal distress has been taken, and the goods sold, the tenant may either bring an action against the landlord to recover the receipts of the sale, or he may bring an action of trespass, under which, if it is properly brought on the statute 2 W. & M. c.

5, s. 4, he may, if no rent was in arrear or due, recover double the value of the goods sold.

Replevin.

309. When an illegal distress has taken place, the remedy most frequently resorted to is an action of replevin, because by having recourse to that the tenant both recovers his own goods or prevents them from being taken away, and also obtains damages for any inconvenience or loss to which he may have been put in consequence of the distress having been levied on his premises, or his goods having been detained from him. Under the common law there was no power to sell the distress—it was a mere pledge in the hands of the landlord to secure his rent, and so long as he had security that his claim, if legal, would be duly paid, he had no right to more. The tenant was, therefore, permitted to take back his goods, on giving security to the sheriff of the county either to prosecute successfully an action against the distrainor for the unlawful taking, or in case the judgment was against him, to pay the rent. This was called replevying the goods, that is, substituting one pledge for another.

Action, procedure in.

310. An action of replevin was formerly special and complicated in its procedure. It is now begun like any other action by a writ of summons. It was formerly confined to cases of recovery of goods wrongfully taken

by distress, but is now extended to all cases of wrongful taking. The rules of the Supreme Court of Judicature regulating the procedure in actions of replevin are 1098 to 1111.

Affidavit for order.

311. When a party desires to obtain his goods by this method of procedure, he must, after issue of a writ, apply on affidavit for an order of replevin. This order is issued on demand on filing an affidavit stating:

(1) That the person claiming the property is the owner thereof, or that he is lawfully entitled to the possession thereof, describing the property in the affidavit.

(2) The value thereof to the best of his belief.

(3) That the property was taken under colour of a distress for rent.

Order.

312. An order is then issued which must state that the defendant has taken and unjustly detains the property under colour of a distress for rent.

313. The order directs the sheriff to take without delay the security required by law, and to cause to be replevied to the plaintiff the property as described and valued by the affidavit, and to return his proceedings to the Court.

314. The sheriff then, before acting under the order, must take a bond from the plaintiff with two sufficient sureties in treble the value of the property to be replevied, as stated in the affidavit, which bond is assignable to the defendant. Bond.

315. The condition of the bond so taken is that if the plaintiff prosecutes his suit with effect and without delay against the defendant for the taking and unjustly detaining his cattle, goods and chattels, and returns the property, if a return is adjudged, and also pays any damages which the defendant may sustain by the issuing of the writ of replevin; if the plaintiff fails to recover judgment in his suit, and also that if the plaintiff observes, keeps and performs all rules or orders made by the Court in the suit, then the bond is void, otherwise the plaintiff and his bondsmen become liable in damages to the sheriff or the defendant if the bond is to him assigned by the sheriff.

316. In cases of replevin, where the goods have been distrained for rent the bond does not cover costs which are not taxable as between solicitor and client. Only taxable costs are recoverable, that is, those payable as between party and party. Costs.

317. The sheriff then takes the goods, delivers them to the plaintiff, and returns the order to the Court on or before the tenth day after its service.

Judgment.

318. If the plaintiff signs judgment by default, he is at liberty to sign final judgment for the sum of five dollars and his costs. He cannot get any larger sum for damages, except when it is granted by a Judge or jury, or upon filing a written consent of the defendant or his solicitor, verified by affidavit of execution.

Action on bond.

319. The suit, if defended, must proceed, the bond being the security of the defendant instead of the goods. An action on this bond will lie (1) for not prosecuting the action with effect, which means not successfully; (2) for delay; (3) for not returning the goods.

CASES.

Action for double value.

Action for double value under 2 W. & M. c. 5, s. 5. The fifth section of the statute does not extend to a holding of land where there is no rent reserved:

McCaskell v. *Rodd*, 14 O. R. 282.

Distress.

In an action for wrongful distress for rent before it was due, there was no allegation in the statement of claim that the action was brought upon 2 W. & M. c. 5, s. 5, nor that the goods distrained were sold, but merely an allegation that the defendant sold and carried away the same and converted and disposed

thereof to his own use, nor was a claim made for double the value of the goods distrained and sold within the terms of the statute. Damages.

Held, the action was an ordinary action for conversion, and that the value, and not the double value, of the goods distrained was recoverable.

CHAPTER XVI.

THE RECOVERY OF TENEMENTS.

320. After the expiration of a term of years, or at the end of a notice to quit in the case of a tenancy thus determinable, a landlord may enter upon, and obtain possession of, the demised premises if they are vacant, or if he can do so peaceably. If at the time they are left locked up, and deserted by the tenant, he may break in. But if anyone opposes him he has no right to make a forcible entry; and even if he gets in peaceably, he must not turn the inmates out forcibly. If he does, he will, unquestionably, be liable to an indictment; and he may also be liable to an action for assault at the suit of the parties. A proviso for re-entry may, indeed, be framed to Landlord may make peaceable entry.

give the lessor the right of forcible ejectment, and to protect him from an action, as between himself and the lessee; but that will not take away the indictable offence. If the landlord desire to be perfectly safe he must resort to one or the other of the various methods of obtaining possession by legal proceedings.

Modes of recovering possession by law.

321. Where the landlord has a right to enter in consequence of the determination of the tenancy by one of the means to which I have referred in a former chapter, he may proceed, according to circumstances, to recover possession either by application to the County Judge under the Overholding Tenants' Act, or in the County Court if the value of the land does not exceed $200, or in the High Court of Justice.

Overholding Tenant's Act.

322. The first mode of regaining possession is under the Overholding Tenants' Act.

323. Formerly it was very difficult for a landlord to succeed under this statute, because the Judges refused to interfere whenever a tenant could shew a "colour of title." It was often easy for a tenant to set up some defence which the Judge had to take into account and dismiss the application. Now the Act is much wider, and the "colour of right" ground for resistance to the application will be of no

avail. The main clauses of the Act, as amended in 1895 and 1896, are the following:

Application to be made to the County Judge against overholding tenant upon affidavit.

In case a tenant, after his lease or right of occupation, whether created by writing or by verbal agreement, has expired or been determined either by the landlord or the tenant by a notice to quit, or notice pursuant to a proviso, in any lease or agreement in that behalf, or has been determined by any other acts whereby a tenancy or right of occupancy may be determined or put an end to, wrongfully refuses upon demand made in writing to go out of possession of the land demised to him, or which he has been permitted to occupy, his landlord, or the agent of his landlord, may apply to the County Judge of the county, or union of counties, in which the land lies, and wherever such Judge then is.

Judge to appoint time and place for determining matter

And such Judge shall appoint a time and place at which he will enquire and determine whether the person complained of was tenant to the complainant for a term or period which has expired, or has been determined by a notice to quit, or for default in payment of rent, or otherwise, and whether the tenant holds the possession against the right of the landlord, and whether the tenant does wrongfully refuse to go out of possession, having no right to continue in possession, or how otherwise.

Notice thereof to be served on the tenant.

Notice in writing of the time and place so appointed for holding such inquiry, and stating briefly the principal facts alleged by the landlord to entitle him to possession shall be served by the landlord upon the tenant, or left at his place of abode at least three days before the day so appointed, if the place so appointed is not more than twenty miles from the tenant's place of abode; and one day in addition for every twenty miles above the first twenty, reckoning any broken number above the first twenty as twenty miles; to which notice shall be annexed a copy of the affidavit on which the appointment was obtained and of the papers attached thereto.

Proceedings in default of appearance.

Sec. 5. If at the time and place appointed as aforesaid, the tenant, having been duly notified as above provided, fails to appear, the Judge, if it appears to him that the tenant wrongfully holds, may order a writ to issue to the sheriff in the Queen's name commanding him forthwith to place the landlord in possession of the premises in question; but

In case of appearance.

if the tenant appears at such time and place, the Judge shall in a summary manner hear the parties and examine into the matter, and shall administer an oath or affirmation to the witnesses adduced by either party and shall examine them; and if, after such hearing and examination, it appears to the Judge

Proceeding to form part of the records of the Court.

that the case is clearly one coming under the true intent and meaning of section 2 of this Act, and that the tenant wrongfully holds against the right of the landlord, then he shall order the issue of such writ as aforesaid, otherwise he shall dismiss the case, and the proceedings in any such case shall form part of the records of the County Court.

Proceedings, how entitled.

Sec. 10. The proceedings under this Act shall be entitled in the County Court of the county, or union of counties, in which the premises in question are situate and shall be styled:

In the matter of (giving the name of the party complaining), landlord, against (giving the name of the party complained against), tenant.

County Court jurisdiction.

324. Actions in the County Court for recovery of land are restricted to cases where the value of the land is under $200.

High Court of Justice.

325. In the High Court of Justice the practice in actions for the recovery of possession of land is now assimilated to that of all other actions.

Practice.

326. Any account of the proceedings in an ordinary action for the recovery of possession of premises is entirely foreign to the object of this book. Solicitors know where to find the necessary information in books on practice. If persons who are not solicitors wish to manage their litigation for themselves they will find in the same books the requisite information.

327. Perhaps enough has been said to shew that though the law on the subject of landlord and tenant has been simplified on many points, it is still in the main complex. It must always be so, and all that can be done by the Legislature and by the Courts is to reduce, as far as possible, the opportunities for differences.

Special provisions

328. There are a few sections of the Landlord and Tenant Act which require reproduction. They relate to the recovery of premises by landlords where a lease is determined and the tenant refuses to go out. (R. S. O. c. 143, ss. 23-26.)

Proceedings when the time for which any tenant holds the lands

In case (1) the term or interest of any tenant of any land, tenements or hereditaments, holding the same under a lease or agreement in writing for any term or number of years certain, or from year to year, expires, or is determined either by the landlord or tenant by regular notice to quit; and (2) in case a lawful demand of possession in writing, made and

leased has expired and the tenant refuses to deliver possession after notice.

signed by the landlord or his agent, is served personally upon the tenant, or any person holding or claiming under him, or is left at the dwelling house or usual place of abode of such tenant or person; and (3) in case such tenant or person refuses to deliver up possession accordingly, and the landlord thereupon proceeds by action for recovery of possession, he may at the foot of the writ of summons address a notice to such tenant or person requiring him to find such security, if ordered by the Court or a Judge, and for such purposes as are hereinafter next specified.

Circumstances under which landlord may give notice to tenant to find security.

Upon the appearance of the party, or in case of non-appearance, then, on making and filing an affidavit of service of the writ and notice, and on the landlord's producing the lease or agreement, or some counterpart or duplicate thereof, and proving the execution of the same by affidavit; and upon affidavit that the premises have been actually enjoyed under such lease or agreement, and that the interest of the tenant has expired or been determined by regular notice to quit (as the case may be); and that possession has been lawfully demanded in manner aforesaid, the landlord may apply to the Court or a Judge for a rule or summons for such tenant or person to show cause within a time to be fixed by the Court or Judge, on a consideration of the situation of the premises, why such tenant or person should not enter into a bond by himself and two sufficient sureties in a reasonable sum, conditioned to pay the costs and damages, which may be recovered by the plaintiff in the action, and the Court or Judge, upon cause shown, or upon affidavit of the service of the rule or summons in case no cause is shown, may make the same absolute in whole or in part, and order such tenant or person within a time to be fixed, upon a consideration of all the circumstances, to give such bond to the plaintiff, with such conditions and in such manner as may be specified in the said rule or summons, or the part of the same so made absolute.

In case the party neglects or refuses to comply with such rule or order, and gives no ground to induce the Court or Judge to enlarge the time for obeying the same, then the lessor or landlord, upon filing an affidavit that such rule or order has been made and served and not complied with, may sign judgment for the recovery of possession and costs of suit. If not given when ordered judgment may be signed.

No action or other proceeding shall be commenced upon the bond after six months from the time when the possession of the premises, or any part thereof, has been actually delivered to the landlord. Limitation of action upon bond

329. A very important section of the Landlord and Tenant Act (section 16) is as follows:

Every tenant to whom a writ in an action for the recovery of land has been delivered, or to whose knowledge it comes, shall forthwith give notice thereof to his landlord, or to his bailiff or receiver, and if he omits to do so he shall forfeit to the person of whom he holds the value of three years' improved or rack-rent of the premises demised or holden in the possession of such tenant, to be recovered by action in any Court having jurisdiction for the amount. Penalty for tenant receiving writ for recovery of land and not notifying his landlord.

330. Proceedings to be taken for the recovery of premises which the tenant has deserted before the termination of his tenancy, and without giving proper notice to quit, or leaving any goods on which the landlord may distrain for his rent, are founded on 11 Geo. II. c. 19, s. 16, which enacts that if any Recovery of deserted premises.

tenant holding any lands, tenements or hereditaments at a rack-rent, or a reserved rent of full three-fourths of the yearly value of the demised premises, who shall be in arrear for half a year's rent, shall desert the premises, and leave the same uncultivated and unoccupied, so as no sufficient distress can be had to countervail the arrears of rent, it shall be lawful for two or more justices of the peace* for the county, riding, division or place (having no interest in the demised premises), at the request of the lessor or his bailiff, to go upon and view the same, and cause to be affixed on the most notorious part of the premises notice in writing what day (at the distance of fourteen days at least) they will return to take a second view thereof; and if upon such second view the tenant, or some person on his behalf, shall not appear and pay the rent in arrear, or there shall not be sufficient distress upon the premises, then the justices may put the landlord into the possession of the demised premises; and the "lease thereof to such tenants as to any demise therein contained only shall from thenceforth become void."

Appeal from justices.

331. Under section 17 of the above mentioned 11 Geo. II. c. 19, proceedings before the justices under this Act are examinable in a

*In cities in Ontario the police magistrate has this authority.

summary way by the Judges of the Courts of Queen's Bench or Common Pleas (in Ontario by the High Court of Justice); and such Judges are empowered, if they think fit, to direct the premises to be restored to the tenant, and to make an order for his costs upon the landlord; or, in case they affirm the order of the justices, to compel the tenant to pay his landlord a sum not exceeding £5, as the costs of such frivolous appeal.

Result of provisions.

332. The meaning of these last words "the lease, etc.," which occur in the Act, is that although by the execution of the warrant a lease or agreement is annulled, so far as it gives the tenant any right to the possession of the premises, no liabilities which he may have incurred under it in respect to payment of rent, repairs, etc., are at all affected, but that he may still be sued in respect thereof if he can be found.

Information on oath not required.

333. It will also be observed that by this statute the magistrates are to act "at the request" of the landlord or his agent. No information on oath need, therefore, be laid before them by the landlord; nor need they make any enquiry upon oath; they may act upon the mere statement of the landlord that the rent is due, satisfying themselves upon their own view whether or not the premises are deserted, and whether or not there is

sufficient distress upon them to satisfy the rent.

Requisites

334. If the premises are left entirely unoccupied no difficulty can arise; and, on the other hand, while sufficient property is left to cover any distress for accruing rent, no proceedings can be taken under this Act.

Set-off.

335. It is very doubtful whether a landlord can proceed under this Act if the tenant have any set-off against the rent.

Proceedings a defence in actions of trespass.

336. When the magistrates have given to the landlord possession of property, as deserted and unoccupied, and the Court has, on appeal, made an order for its restitution to the tenant with costs, the record of the proceedings before the magistrates will be a good defence on the part of the landlord, should the tenant afterwards bring an action of trespass against him.

CASES.

Measure of damages

In an action by the plaintiff (lessee) against lessor for breach of covenants in lease to dig ditches, etc.: Held, that the measure of damages was the difference between the rentable value of the land with the defendant's covenant performed, that is, with the improvements made, and the value without such improvements:

McEwen v. *Dillon*, 12 O. R. 411.

Action by a tenant against his landlord for refusing to give him possession of the demised premises. Held, that the proper measure of damages in such a case is the difference between what the tenant agreed to pay for the premises and what they were really worth:

Marrin v. *Grover*, 8 O. R. 39.

Breach of covenant to repair.

In an action on a lease (having many years to run) for rent and non-repair of the premises: Held, that the reversioner, by reason of the length of lease, was not restricted to nominal damages, but the measure of damages was the amount to which the reversion was injured by want of repair:

Atkinson v. *Beard*, 11 C. P. 245.

Interest on arrears. Give notice if you wish to claim it.

As to claims for interest on arrears of rent, see *Crooks* v. *Dickson*, 1 L. J. N. S. 211. It must be demanded.

CHAPTER XVII.

MISCELLANEOUS STATUTORY DIRECTIONS.

337. There are to be met with in a few statutes directions specially relating to landlords or tenants. These are here reprinted.

338. 1887.—Act respecting Snow Fences (R. S. O. c. 198):

(1) The council of every township, city, town or incorporated village shall have power to require owners

Councils may require owners or occupants of lands to remove fences.

Making compensation therefor.

or occupiers of lands bordering upon any public highway to take down, alter or remove any fence found to cause an accumulation of snow or drift as to impede or obstruct the travel on the public highway or any part thereof; and where such power is exercised, they shall make such compensation to the owners or occupants for the taking down, alteration or removal of such fence, and for the construction of some other description of fence approved of by the council in lieu of the one so required to be taken down, altered or removed, as may be mutually agreed upon; and if the council and the owners or occupants cannot agree in respect to the compensation to be paid by the council, then the same shall be settled by arbitration in the manner provided by the Municipal Act, and the award so made shall be binding upon all parties.

Power in case of neglect or refusal to construct fence as directed.

(2) In case the owner or occupant shall, by neglect to take down, alter or remove the fence, and to construct such other fence as required by the council, the council may, after the expiration of two months from the time the compensation to be paid by the council has been agreed upon or settled by arbitration, proceed to take down, alter or remove the old fence, and construct the other description of fence which has been approved of by the council; and the amount of all costs and charges thereby incurred by the council, over and above the amount of compensation agreed upon or settled by arbitration, may immediately be recovered from such owner or occupier by action in any Division Court having jurisdiction in the locality; and the amount of the judgment in favor of the municipality obtained in such Court shall, if not sooner paid, be by the clerk of the municipality placed upon the next collector's roll as taxes against the lands upon or along the boundaries of which the fence is situate; and after being placed upon the collector's roll shall be collected and treated in all respects as other taxes imposed by

by-laws of the municipality; when a tenant or occupant, other than the owner, shall be required to pay the aforesaid sum, or any part thereof, the tenant or occupant may deduct the same, and any costs paid by him from the rent payable by him, or may otherwise recover the same, unless the tenant or occupant shall have agreed with the landlord to pay the same.

339. 1894.—Ditches and Watercourses Act (section 15):

(1) Notices under the provisions of this Act shall be served personally, or by leaving the same at the place of abode of the owner or occupant with a grown-up person residing thereat; and in case of non-residents, then upon the agent of the owner, or by registered letter addressed to the owner at the post-office nearest to his last known place of residence; and where this is not known, then he may be served in such manner as the Judge may direct. Mode of serving notices.

(2) Any occupant, not the owner of land, notified in the manner provided by this Act, shall immediately notify the owner thereof, and shall, if he neglects to do so, be liable for all damages suffered by such owner by reason of such neglect. Occupant to notify owner.

340. 1887.—Line Fences (R. S. O. c. 219, s. 5):

An occupant, not the owner of land, notified in the manner above mentioned, shall immediately notify the owner, and if he neglects so to do, shall be liable for all damage caused to the owner by such neglect. Duty and liability of occupants as to notifying owners.

The notification referred to is that of intention to bring in fence-viewers.

341. 1887.—Act respecting Public Health (R. S. O. c. 205, s. 104):

Recovery of costs and expenses of execution of provisions relating to nuisances.

Any costs or expenses recoverable from an owner of premises under this Act, or under any provision of law in respect of the abatement of nuisances, may be recovered from the occupier for the time being of such premises; and the owner shall allow such occupier to deduct any moneys which he pays under this enactment, out of the rent from time to time becoming due in respect of said premises, as if the same had actually been paid to such owner as part of said rent: Provided that no such occupier shall be required to pay any further sum than the amount of rent for the time being due from him, or which, after demand of such costs or expenses from such occupier, and after notice not to pay his landlord any rent without first deducting the amount of such costs or expenses, becomes payable by such occupier unless he refuses truly to disclose the amount of his rent and the name and address of the person to whom rent is payable; but the burden of proof that the sum demanded from such occupier is greater than the rent due by him at the time of such notice, or which has since accrued, shall be on such occupier.

(2) Nothing in this section contained shall affect any contract between any owner or occupier of any house, building or other property, whereby it is or may be agreed that the occupier shall pay or discharge all rates and dues and sums of money payable in respect of such house, building or other property, or affect any contract whatever between landlord and tenant.

FORMS.*

WAIVER OF EXEMPTIONS.

The said lessee do hereby, for heirs, executors, administrators and assigns, hereby covenant promise and agree with the said lessor heirs and assigns, as follows: That in consideration of the premises, and of the leasing and letting by the said lessor to the said lessee of the lands and premises above named for the term

*The forms here given are based on the use, which is almost universal in Ontario, of the short form, as provided by the Short Forms of Leases Act. The covenants printed in this appendix are in addition to those contained in the short form. In drawing a lease it is well to use that form; if any particular covenant requires alteration, strike it out of the short form and write what you consider you require as an additional covenant. The effect of the short form is now well understood by our people, and the covenants it contains fairly carry out the average intentions of lessor and lessee. English conveyancers prefer to use the long covenants although the short form was authorized by Imperial Statute.

hereby created (and it is upon that express understanding that these presents are entered into) that, notwithstanding anything contained in section twenty-seven of chapter one hundred and forty-three of the Revised Statutes of Ontario, 1887, or any other section of said Act, as amended by statute of the Province of Ontario, that none of the goods or chattels of the said lessee at any time during the continuance of the term hereby created, on said demised premises, shall be exempt from levy by distress for rent in arrear by said lessee as provided for by said section of said Act above named, and that upon any claim being made for such exemption by said lessee or on distress being being made by the said lessor this covenant and agreement may be pleaded as an estoppel against said lessee in any action brought to test the right to the levying upon any such goods as are named as exempted in said section. Said lessee waiving, as he hereby does, all and every benefit that could or might have accrued to him under and by virtue of the said Act, but for the above covenant.

Tenant waives exemptions.

ACCELERATION CLAUSE.

And also, that if the term hereby granted shall be at any time seized or taken in execution, or in attachment, by any creditor of the said lessee or if the said lessee shall make any assignment for the benefit of creditors, or becoming bankrupt or insolvent, shall take the benefit of any Act that may be in force for bankrupt or insolvent debtors, the then current rent shall immediately become due and payable, and the said term shall immediately become forfeited and void.

Current rent becomes due.

FURTHER COVENANTS APPROPRIATE FOR A FARM LEASE TO BE ADDED TO COVENANTS IN SHORT FORM LEASE.

And the said lessee do hereby, for heirs, executors, administrators and assigns, covenant, promise and agree, to and with the said lessor heirs and assigns, in manner following, that is to say:

And that the said lessee will during the said term cultivate, till, manure, and employ such part of said demised premises as is now, or shall hereafter be brought under cultivation, in a good husband-like and proper manner, so as not to impoverish or injure the soil, and plough said land in each year during said term inches deep, and at the end of said term will leave the said land so manured as aforesaid. And will crop the same during the said term by a regular rotation of crops in a proper farmer-like manner, so as not to impoverish or injure the soil of the said land, and will use his best and earnest endeavours to rid said land of all docks, wild mustard, red roots, Canada thistles, and other noxious weeds. And will preserve all orchard and fruit trees (if any) on the said premises from waste, damage or destruction; and will spend, use and employ, in a husband-like manner, upon the said premises, all the straw and dung which shall grow, arise, renew, or be made thereupon; and will allow any incoming tenant to plough the said land after harvest in the last year of the said term, and to have stabling for two horses and bed room for one man. And will leave at least acres seeded down with timothy and clover seed.

Good husbandry.

Rotation of crops.

Fruit.

Manure.

Seeding down.

(Instead of Short Form covenant number 5).

And shall not nor will during the said term cut any standing timber upon the said lands, except for rails or for buildings upon the said demised premises, or for firewood upon the premises, and shall

not allow any timber to be removed from off the said premises.

(Instead of Short Form covenant number 3).

And also, shall and will, at the costs and charges of the said lessee well and sufficiently repair and keep repaired the erections and buildings, fences and gates erected or to be erected upon the said premises.

OPTION TO LESSEE TO PURCHASE FREEHOLD.

And it is hereby agreed, on the part of the said part of the first part heirs, executors, administrators and assigns, that if at any time within the said term of the said part of the second part heirs, executors, administrators, or assigns, shall desire to purchase the fee simple of the lands hereby demised, shall be allowed to do so by paying the sum of of lawful money of Canada [set out terms], provided the said rent shall have been regularly paid up to the time when may so desire to purchase; and also, provided that the rent accruing, or to accrue, due for the remainder of the term above created, then unexpired, shall also have been paid, but the said part of the first part shall not be bound to give covenants or assurances for title other than for and in respect to his own acts.

Set out terms of purchase as fully as in any other agreement

And it is hereby declared and mutually agreed, by and between the parties hereto, that time in the payment by the said part of the second part, heirs, executors, or assigns, to the said part of the first part, heirs, executors, or assigns, of the said sum of under the proviso or agreement above set forth in that behalf, and within the period of above limited

therefor, as the purchase money for the premises, shall be strictly the essence of this contract, and that default in payment by the said part of the second part, of the said sum, within the said time or period of from the date hereof above limited, over, above and in addition to all rents above reserved, shall render absolutely null and void so much of these presents as relates to the sale by the part of the first part; or purchase by the part hereto of the second part of the premises above mentioned, and the jurisdiction of the several Courts of this Province in reference thereto shall be wholly barred, and the said part of the first part shall be absolutely released and discharged from the performance or execution of the said agreement, and the said part of the second part shall be deprived of all right to enforce the same, notwithstanding any rule (if such there be) that time cannot be made of the essence of a contract, or any other rule or maxim whatsoever.

In witness, etc.

Signed, sealed, etc.

COVENANT TO BUILD.

And the said lessee do hereby, for executors, administrators and assigns, covenant, promise and agree, to and with the said lessor heirs, executors, administrators and assigns, that he the said lessee executors, administrators, or assigns, shall and will within months after the date of these presents, at and costs and charges, erect, construct, build and finish, fit for habitation, on the said land hereby demised, and upon that part thereof designated on the said plan of building lots now filed in good and substantial messuage or dwelling house , with

suitable out-buildings, all of brick or stone material, to cost at least dollars of lawful money of Canada, which messuage or dwelling house and out-building shall be of brick or stone material, and, in so far as the elevations thereof are concerned, be built in accordance with the plans hereunto annexed; and the said elevations of the said messuage or dwelling house shall be faced with stone or white brick, or with red pressed brick, such red pressed brick facing to have also cut stone or white pressed brick dressings, but no common red brick, or field or lake stone, shall be used for facing the walls of any building of any description to be erected on the said demised premises (or, as the case may be).

According to circumstances of case.

COVENANT TO REINSTATE.

Also, that if at any time during the said term the said dwelling house and buildings, or any of them, shall be injured, damaged, or destroyed, whether by fire, wind, tempest, invasion of enemies of the Province, or otherwise howsoever, the said lessee executors, administrators, or assigns, shall and will at or costs and charges within months after the same shall be so injured, damaged or destroyed, repair, rebuild, or reinstate the said dwelling house and buildings, in accordance with the said plans hereunto annexed, or any improved or substituted plans, which may be approved of by the said lessor, heirs, executors, administrators, or assigns; but it is hereby provided, that the yearly rent hereby reserved, and every part thereof, shall be paid as hereinbefore provided, notwithstanding any such injury or damage to or destruction of the said dwelling house and buildings as aforesaid.

Notice, plans required.

COVENANTS APPROPRIATE FOR LEASE OF LAND LET FOR PURPOSES OF BUILDING DWELLINGS.

And the said lessee do hereby, for executors, administrators and assigns, covenant, promise and agree with and to the said lessor heirs, executors, administrators and assigns, that the said lessee executors, administrators, or assigns, shall not nor will erect, or suffer or permit to be erected, put or placed upon the said demised premises any building or buildings whatsoever, other than those hereinbefore mentioned and described, and that if and when, and so often as any such building or buildings, other than those hereinbefore mentioned and described, shall during the said term be erected, put or placed upon the said demised premises, or any part thereof, then the said lessee executors, administrators, or assigns, shall and will, at or costs and charges, upon being notified so to do by the said lessor heirs, executors, administrators or assigns, immediately pull down, demolish, or remove the same, and within months thereafter, at or costs and charges, erect, construct, build and finish fit for habitation other buildings instead thereof, in accordance with the said plans hereunto annexed. And also, that the said lessee executors, administrators, or assigns, shall and will, within the said period of months from the date hereof, at or costs and charges, erect, construct and place a fence in front of the said demised premises, which fence shall be of such materials, and shall be erected in accordance with such plans as the said lessor heirs, executors, administrators, or assigns, shall approve of for that purpose. And also, that he the said executors, administrators, or assigns, or the occupant or occupants, tenant or

Notice, plans required.

tenants, of the said demised premises from time to time, shall not nor will, at any time during the said term, carry on, or permit or suffer to be carried on, within the said messuage dwelling house or tenements, so to be erected as aforesaid, or on any part of the same, any trade or business whatsoever, or convert the said dwelling house or tenements, or any part thereof, into a shop or shops, warehouse, or storehouse, or otherwise attempt to carry on any trade or business on the said demised land, or any part thereof, or suffer or permit the said lands or buildings to be occupied or used for any object or purpose whatever, other than for said dwelling house and premises, or for any purpose which shall in any way be deemed a nuisance, or which shall prejudicially affect the value of the same, or that of the surrounding or neighbouring lands and buildings.

Nuisance forbidden.

COVENANT FOR PERPETUAL RENEWAL.

Provided always, and it is hereby agreed by and between the said lessor and lessee that at the expiration of the said term of years, the said lessee executors, administrators, or assigns, shall have the privilege of receiving a renewal of this lease for the further period of years longer, and so on for every years perpetually, the rent to be payable for the said demised premises during any such renewal term of years to be such as the said lessor heirs, executors, administrators, or assigns, and the said lessee executors, administrators, or assigns, shall agree upon; but in the event of their not being able to agree upon the amount of such rent, then the same shall be determined by two arbitrators, one to be chosen by each party, who if they cannot agree shall appoint a third arbitrator, and the award in writing of the majority of the said

arbitrators (which shall be made and published within one calendar month from the date of the appointment of the arbitrator last appointed), fixing the amount of the said rent for the then next ensuing period of years, shall be binding and conclusive on all parties, the costs of such arbitration to be borne by both parties in equal shares; and in case either of the said parties shall neglect or refuse for the space of fourteen days after being thereunto required in writing by the other party to nominate an arbitrator, then the arbitrator nominated by the party not so neglecting or refusing shall alone determine the said rent, and his award in writing (to be made and published within two calendar months from the date of his appointment) shall be binding on both parties; but in the valuation and appraisement of the said rent for any such renewal term, the same shall be calculated as ground rent of a block or parcel of land situated as the said demised premises are situated, without reference to any buildings, tenements, houses, or erections thereon.

And the said renewal lease shall be drawn and prepared at the cost and charges of the said lessee executors, administrators, or assigns, and shall contain the like covenants, provisos, and agreements as are herein contained, including this present agreement for renewal, and the plans hereto annexed, or exact copies thereof, or other improved or substituted plans, approved of by the said lessor heirs, executors, administrators or aassigns, shall be annexed to the said lease.

Remember the force of these words.

COVENANT FOR RENEWAL.

Another Form.

And also that immediately after the expiration of the said term of years, the said part of

the first part, heirs and assigns, shall and will grant another lease of the said hereby demised premises, with the appurtenances, containing the like covenants, conditions, provisos, and agreements as are in this lease contained and expressed, and at and under a certain yearly rent, payable in quarterly payments, the amount whereof to be ascertained in manner following, that is to say: To be fixed on, and determined upon, and declared by two appraisers, to be named and appointed, one of them by the said part of the first part, heirs and assigns, the other by the other part of the second part, executors, administrators and assigns, with power to them, the said appraisers, to name and call in a third if they cannot agree; and in such valuation and appraisement the amount of such rent shall be calculated altogether as ground rent of a block or parcel of land situated as the said premises are situated, and the value of any buildings, tenements, houses or erections thereon, is not to be considered in any wise in making such appraisement; such appraisement to be made within fourteen days after the end of the term hereby granted. Such rent to be payable in quarterly payments as aforesaid, and to commence from and immediately after the termination of the term; or, if the said part of the first part, heirs and assigns, decline making such renewal for a second term,—which it shall be optional for him or them to do or make (but of which intention to decline, the said part of the first part. heirs or assigns, shall give to the said part of the second part executors, administrators or assigns, or leave at his or their last known place of abode, a notice, in writing, at least three calendar months before the expiration of the said term of years hereby granted, or any future term to be granted as hereby provided,—then it is hereby expressly covenanted, declared and agreed upon, by and between the parties hereto and their respective representatives, that all the buildings, houses and erections, placed,

Valuation by appraisement —not by arbitration

erected and being on said premises at the expiration of the first term of years, by the said part of the second part, executors, administrators or assigns, shall be duly valued and appraised, by appraisers named and appointed on behalf of each party, as above particularly mentioned, with power to them to name, refer to and call in a third person, should they not agree as above mentioned—such appraisement to be made within fourteen days from and after the determination of the said first term hereby demised—who shall fix on the value under the conditions aforesaid: And the said part of the first part, hereby for heirs, and assigns, covenant, promise and agree, to and with the said part of the second part, executors, administrators and assigns, that he or they, or some one of them, will pay to the said part of the second part, executors, administrators and assigns, the full sum of money so to be fixed by the said appraisers, or their referee, as the value of or compensation for said houses, buildings and erections, on the said hereby demised premises then standing and being, within one calendar month after such value is ascertained and declared as aforesaid, a renewal for a second term having been declined to be made by him or them as aforesaid: And also, that if any such renewal of a second term be granted as aforesaid, under the terms and conditions herein provided for granting the same, by the said part of the first part, heirs or assigns, to the said part of the second part, executors, administrators and assigns, that at the end of such renewed term, so to be granted as aforesaid, the said part of the first part, heirs and assigns, shall and will grant a further renewed lease to the said part of the second part, executors, administrators and assigns, of a further term of years, precisely on the same terms and conditions as hereinbefore provided for the first renewal thereof, the amount of rent payable quarterly to be ascertained by ap-

Further lease not necessarily perpetual.

praisers in the manner and form above provided and set forth, or shall and will pay for all buildings and erections then being on said premises (should such renewal be refused or declined, and of which notice shall have been given as aforesaid), at a rate to be ascertained by appraisement as aforesaid, and within the time, and according to the terms, conditions and agreements above mentioned and expressed; and so on at the end of every renewed term; it being the true intent and meaning of these presents, and it is hereby expressly covenanted and agreed upon, by and between the said parties thereto, heirs, executors, administrators and assigns, that at the end of the hereby granted term of years, and also at the end of every renewed term of years, so to be granted as aforesaid, the said part of the first part, heirs and assigns, shall grant a renewed term or lease of years of the said hereby demised premises, and so on for ever, ascertaining the amount of rent to be paid during such renewed term by appraisement, as hereinbefore provided, and always estimating the amount of said rent as ground rent, and exclusive and independent of all buildings and improvements thereon erected, put, placed and being, until the said part of the first part, heirs or assigns, elect to determine these presents, and all further renewal or renewals of the hereby demised premises, and of which notice shall be given as aforesaid, by paying within the term above limited at the expiration of each term, for all such buildings, erections and improvements as may be put, placed, erected and then being thereon, by the part of the second part executors, administrators or assigns, the appraised value, to be ascertained and estimated by referees in manner hereinbefore provided. And it is hereby further covenanted and agreed upon, by and between the said parties of the first and second parts, for themselves and their respective legal representatives, that all dower and all charges and costs

How rent ascertained.

arising from the demand of the same, that may hereafter be made, and that may be chargeable on the said premises, and legally and lawfully demanded therefor, shall be deducted from the rent reserved or to be hereafter reserved, as aforesaid, for the said premises, such dower being limited to the ground (and not to apply to the improvements thereon), and the rents, issues and profits thereof, it being hereby clearly admitted and understood that the buildings and improvements to be made and erected on said premises will be made and erected by the said part of the second part, executors, administrators and assigns, and that the said part of the second part, executors, administrators and assigns, shall be answerable only for the balance of such rent, after deducting such dower and the charges accruing from demanding or enforcing the same, anything herein contained to the contrary thereof in anywise notwithstanding. And also that if the said part of the first part, heirs, executors, administrators or assigns, do and shall, at any time hereafter, neglect, decline or refuse to pay to the said part of the second part, executors, administrators or assigns, the full sum of money so to be fixed and determined by the said appraisers, or their referee, as the value or compensation for the said houses, buildings and erections on the said hereby demised premises then standing and being (upon being lawfully demanded), for the space of one calendar month after such value is ascertained, declared and demanded as aforesaid (a renewal for a second, or for any subsequent term, having been declined to be made by him or them, and notice given as aforesaid), or if he or they refuse or neglect to name and appoint an appraiser, for the purpose of ascertaining and determining such value, within the period above fixed and prescribed, then, in either such case, the said part of the second part, executors, administrators and assigns, shall hold and enjoy the

Money to be paid, when.

said premises for the further term of years, reckoned from the expiration of the preceding term, subject to the same terms, conditions, rents and agreements contained and provided for the term then last expired and ended; nevertheless, subject, after the termination of the term so created, to all the conditions, provisos and agreements contained in and by these presents for the renewal of any term, or for the purchase of the buildings and improvements as aforesaid: It being clearly and fully understood and agreed upon, by and between the said parties to these presents and their legal representatives, that the neglect or refusal to appoint an appraiser, on the part of the lessor, to estimate the value of the improvements as aforesaid, or the neglect or refusal of payment, after notice as aforesaid, for the value thereof, for the space of time above provided and mentioned (after due demand as aforesaid), shall, at all times hereafter, entitle and authorize the said lessee and representatives to hold, own and enjoy the said premises for another term of years, upon the terms and for the rents provided for in the preceding and then expired or expiring term, so often as payment of the purchase money for the buildings and improvements as aforesaid shall be neglected or refused to be made, or the appointment of an appraiser, for the purposes of ascertaining such value, shall be neglected or refused to be made by the said lessor or legal representatives: and that at the expiration of the term hereby created and provided for under the contingencies aforesaid, the original and first provisions and conditions contained in these presents shall then again operate and be in full force and effect.

Refusal to appoint appraiser.

In witness, etc.

Signed, sealed, etc.

(Usual Affidavit of Execution.)

LEASE OF PART OF A HOUSE.

Agreement made the day of , 18 . Between A. B., of and C. D., of, etc.; whereby the said A. B. agrees to let, and the said C. D. agrees to take, the rooms or apartments following, that is to say: being part of a house and premises in which the said A. B. now resides, situate and being No. , in street, in the of .

To have and to hold the said rooms and apartments for and during the term of half a year, to commence from the day of instant, at and for the yearly rent of lawful money of Canada, payable monthly, by even and equal portions, the first payment to be made on the day of next ensuing the date hereof; and it is further agreed that, at the expiration of the said term of half a year [the said C. D. may hold, occupy and enjoy the said rooms or apartments from month to month for so long a time as the said C. D. and A. B. shall agree, at the rent above specified]; or [that each party be at liberty to quit possession on giving the other a month's notice in writing], or, as the case may be.

If any arrangement is made for further continuation.

And it is also further agreed, that when the said C. D. shall quit the premises, he shall leave them in as good condition and repair as they shall be in on his taking possession thereof, reasonable wear excepted.

In witness, etc.

Signed, sealed, etc.

UNDER-LEASE.

This Indenture, made the day of , A.D. 18 , Between C. D., of , of the one part, and

E. F., of , of the other part, witnesseth as follows:

1. The said C. D. demises to the said E. F., his executors and administrators, the premises described in the first schedule hereto, with their appurtenances, from the date hereof, for years, except the last three days, at the yearly rent of $, payable, etc. [as in original lease].

Be very careful in using this form.

2. The said E. F., for himself, his heirs, executors and administrators, covenants with the said C. D., his executors, administrators and assigns (hereinafter called "the lessors"), that the said E. F., his executors and administrators (hereinafter called "the lessees") will pay, etc. [follow the terms of the original lease to the end, substituting the assignor for the lessor, and the assignee for the lessee.]

In witness, etc.

LANDLORD'S INDEMNITY AGAINST RENT AND TAXES.

To C. D.

In consideration of your becoming tenant of my premises, No. , in street, I agree to indemnify you against the payment of any rent, taxes or rates chargeable upon the said premises, or upon any person in respect of the occupation thereof, down to the commencement of your tenancy.

Dated the day of , A.D. 18 .

FORM OF ASSIGNMENT OF LEASE.

This Indenture, made the day of one thousand eight hundred and ninety

Between hereinafter called the assignor of the first part; and hereinafter called the assignee of the second part.

Whereas, by an indenture of lease, bearing date the day of one thousand eight hundred and made between the said lessor therein named, did demise and lease unto the said lessee therein named, executors, administrators, and assigns, all and singular, th certain parcel or tract of land and premises, situate, lying and being in the, etc. [description].

Description of and must be inserted for registration if necessary.

To hold the same, with the appurtenances, unto the said lessee executors, administrators, and assigns, from the day of one thousand eight hundred and for and during the term of years from thence next ensuing, and fully to be complete and ended, at the yearly rent of dollars, and under and subject to the lessee's covenants and agreements in the said indenture of lease reserved and contained.

Now this indenture witnesseth, that in consideration of the sum of of lawful money of Canada, now paid by the assignee to the assignor (the receipt whereof is hereby acknowledged) the said assignor do hereby grant, bargain, sell, assign, transfer, and set over unto the assignee executors, administrators, and assigns, all and singular, the said parcel or tract of land, and all other the premises comprised in and

Covenants 2, 3, 4, 5 of Short Forms of Conveyances Act are implied by this assignment. They are for Right to Convey, Quiet Enjoyment, Free from Incumbrances, Further Assurance, also for Validity of Lease. If by a trustee, a covenant also against such trustee's own acts.

demised by the said hereinbefore in part recited indenture of lease, together with the said indenture of lease, and all benefit and advantage to be had or derived therefrom; to have and to hold the same, together with all houses and other buildings, easements, privileges and appurtenances thereunto belonging, or in any wise appertaining unto the said assignee executors, administrators, and assigns, from henceforth for and during all the residue of the said term granted by the said indenture of lease, and for all other the estate, term, right of renewal (if any), and other the interests of the assignor therein, subject to the payment of the rent and the observance and performance of the lessee's covenants and agreements in the said indenture of lease contained.

In witness whereof, the said parties hereto have hereunto set their hands and seals.

Signed, sealed and delivered in the presence of

(Usual Affidavit of Execution.)

FORM OF MORTGAGE OF LEASE.

This Indenture, made the day of one thousand eight hundred and

Between

hereinafter called the mortgagor of the first part; and

hereinafter called the mortgagee of the second part.

Recitals.

Whereas, by an indenture of lease bearing date on or about the day of one thousand eight hundred and and made between the lessor and the lessee, the said lessor did demise and lease unto the

said lessee executors, administrators and assigns, the lands hereinafter mentioned, with the appurtenances, to hold for and during the term of years, from the day of one thousand eight hundred and at the yearly rent of dollars, and under and subject to the lessee's covenants and agreements therein contained.

And whereas the said leasehold lands and term of years have been assigned to the said mortgagor, executors, administrators and assigns

Now this indenture witnesseth, that in consideration of dollars now paid by the said mortgagee to the said mortgagor (the receipt whereof is hereby acknowledged) he the said mortgagor do hereby grant, bargain, sell, assign, transfer and set over unto the said mortgagee executors, administrators and assigns, all and singular the said leasehold lands, being that certain parcel of land situate with the appurtenances, and all other the premises comprised in and demised by the said lease and the unexpired residue of the said term of years (excepting one day thereof), and all other the estate, term, right of renewal, and other the interest of the said mortgagor therein; to hold unto the said mortgagee executors, administrators and assigns

Describe land fully.

Provided, that if the said mortgagor executors, or administrators, do pay unto the said mortgagee executors, administrators, or assigns, dollars, with interest at per cent. per annum, as follows: and all rents reserved and payable in respect of the said term of years, and all rates and taxes and charges whatsoever, payable upon or in respect of the said lands, and all premiums of insurance upon the buildings upon the said lands, and all payments which are, or may be, payable in respect of, or in consequence of anything contained in the said lease, then these presents shall cease and be void.

And the said mortgagor for executors and administrators, covenant with the said mortgagee executors, administrators, and assigns

Covenant to pay.

That the said mortgagor executors and administrators, will well and truly pay or cause to be paid unto the said mortgagor executors, administrators or assigns, the said principal sum and interest at the times and in manner above provided; and also (unless and until upon default the mortgagee executors, administrators or assigns, do enter upon, lease or sell the said premises) will well and truly pay the said rents, rates, taxes, charges, premiums of insurance and payments, and perform and observe all the covenants and conditions expressed or implied in or by the said lease, and indemnify and save harmless the said mortgagee executors, administrators and assigns, against payment of any such rents, rates, taxes, charges, premiums of insurance and payments, and against all loss, costs, damages and forfeitures whatsoever occasioned by or by reason of or consequent upon any non-payment, non-performance or non-observance in the premium; and further, that if the mortgagor executors or administrators, do make default in payment of any such rent, rates, taxes, charges, premiums of insurance or payments, and the mortgagee executors, administrators or assigns, do pay the same, or any part thereof, the mortgagor executors and administrators, will pay to him and them the amount so paid with interest at the rate of per cent. per annum, and the said premises shall stand charged therewith upon this security.

Lease a good security

And that the said lease is at the time of the sealing and delivery of these presents a good, valid and subsisting lease in the law and not surrendered, forfeited or become void or voidable; and that the rents and covenants therein reserved and contained have been duly paid and performed by the said mortgagor up to the day of the date thereof.

Mortgagor has power to assign.

And that the said mortgagor now ha in good right, full power and lawful and absolute authority to grant, bargain and assign the said lands and premises in manner aforesaid and according to the true intent and meaning of these presents.

Right of entry.

And that in case of default in the payment of any of the moneys or interest hereby secured, or any part thereof, the said mortgagee executors, administrators or assigns, may enter into and upon and hold and enjoy the said premises for the residue of the said term of years and the renewal or renewals thereof (if any) for their own use and benefit, without the let, suit, hindrance, interruption or denial of the said mortgagor executors, administrators or assigns, or any other person whomsoever; and that free and clear and freely and clearly acquitted, exonerated and discharged, or otherwise by and at the expense of the said mortgagor executors and administrators, well and effectually saved, defended and kept harmless, of from and against all former and other gifts, grants, bargains, sales, leases and other incumbrances whatsoever; and that the said mortgagor ha not nor has any other person heretofore made, done, committed or suffered any act, deed, matter or thing whereby or by reason whereof the said premises, or any part thereof, have or has been or may be in anywise charged, affected or encumbered.

Further assurance.

And that the said mortagor executors, administrators and assigns, and all other persons claiming any interest in the said premises, shall and will from time to time, and at all times hereafter, at the request and costs of the said mortgagee executors, administrators or assigns, make, do and execute, or cause and procure to be made, done and executed, all such further acts, deeds, assignments and assurances in the law for more effectually assigning and according to the true intent and meaning of these presents, as by the said mortgagee executors, administrators and assigns, or his or their

counsel in the law, shall be reasonably advised or required.

Insurance.

And also that (unless and until upon default the mortgagee executors, administrators or assigns, do enter upon, or lease or sell the said premises) will from time to time insure, and keep insured, the buildings erected, or to be erected, on the said lands, against loss or damage by fire in some insurance office, or offices, to be approved by the mortgagee executors, administrators, and assigns, in the full amount of dollars, at the least; and at the expense of the said mortgagor executors, and administrators, immediately assign the policy, or policies, of insurance, and all benefits thereof, to the said mortgagee executors, administrators, and assigns, as additional security for the payment of the moneys and interest hereby secured; and that, in default of such insurance, it shall be lawful for the said mortgagee executors, administrators, or assigns, to effect the same; and the moneys so paid, and interest thereon, shall be a charge upon the said lands until repaid.

Relief against forfeiture.

Provided, and it is agreed, that on default of payment of any part of the interest hereby secured, or any part of the said rents, rates, taxes, charges, premiums of insurance, or other payments, the principal money hereby secured shall become payable; but that in such case at any time within which by law relief could be obtained, the mortgagor executors, administrators and assigns, shall, on payment of all arrears and costs, be relieved from the consequences of non-payment of so much of the moneys as has not become payable by lapse of time.

Mortgagee on default may enter and sell.

It is hereby agreed and declared, that in case of default in payment of any of the moneys or interest hereby secured, or any part thereof, and months shall have elapsed without such payment being made (of which default, as also of the con-

tinuance of some part of the said moneys or interest on this security, the production of these presents shall be conclusive evidence), the mortgagee executors, administrators, or assigns, may, without any further consent or concurrence of the mortgagor executors, administrators, or assigns, enter into possession of the said lands and premises, and receive and take the rents, issues and profits thereof, and whether in or out of possession may make any such lease thereof, or any part thereof, as shall think fit; and also may sell and absolutely dispose of the said lands, and the then unexpired term of years therein, and the right of renewal and premises hereby assigned, or any part or parts thereof, by public auction or private contract, or partly by the one and partly by the other, and may withdraw from sale, or buy in, or re-sell, or vary, or rescind, any contract of sale without being responsible for any loss, costs or deficiency thereby occasioned, and may make such terms and conditions of sale and agreements as to title, price, and all other matters whatsoever, as may deem expedient, and may convey and assure the same when so sold to the purchaser or purchasers, and his, her, or their executors, administrators and assigns; provided, that the mortgagee executors, administrators and assigns, shall stand possessed of the said lands, and the rents and profits thereof, until sale, and then of the proceeds of sale in trust, firstly, to pay all costs of getting and keeping possession of the said lands and premises, and of repairs, and of and about the leasing and selling thereof; secondly, to pay all moneys and interest hereby secured; and, lastly, to pay the surplus, if any, to the said mortgagor executors, administrators and assigns, and to re-convey to them the said premises, or so much (if any) thereof as shall remain unsold.

Provided lastly, that until default in payment of some part of the moneys and interest hereby Re-demise clause.

secured, it shall be lawful for the said mortgagor executors, administrators and assigns, to hold, occupy, possess and enjoy the said lands and premises hereby assigned, with the appurtenances, without any molestation, interruption, or disturbance, of, from, or by the said mortgagee executors, administrators and assigns, or any other person claiming under them.

In witness whereof, the said parties hereto have hereunto set their hands and seals.

Signed, sealed and delivered in the presence of

(Usual Affidavit of Execution.)

SURRENDER OF A TENANCY.

Agreement made this day of 18 , between A. B., of, etc., of the one part, and C. D. of, etc., of the other part.

Whereas the said A. B. has been lately, and up to the date hereof, the occupier of premises, as the tenant of the said C. D., under a lease, dated the day of , 18 [or, as the case may be]. And whereas it has been agreed by and between the said A. B. and C. D. that such tenancy shall be determined forthwith: Now, it is hereby witnessed, that in consideration of being relieved by the said C. D. from the further payment of rent and performance of the stipulations contained in the said lease of the day of , 18 , the said A. B. hereby delivers up and surrenders the said dwelling house, and all his interest therein, under the said agreement, to the said C. D. And the said C. D., in consideration of such surrender, accepts the same, and releases the said A. B. from any further payment of rent for the said dwelling house, and hereby discharges and exonerates the said A. B. from any fur-

ther fulfilment of, or liability on account of, any of the stipulations or obligations contained in the said agreement, and on the part of the said A. B. to be performed, but without prejudice to the rights and remedies of the said C. D., in respect to any past breaches of such stipulations and obligations. In witness, etc.

NOTE.—This form will easily be adapted to the surrender of a tenancy under a written agreement (not under seal) for three years. If the lease be for a term of more than three years, and by deed, it can only be surrendered by deed.

FORMS USED IN DISTRESS PROCEEDINGS.

(SEE CHAPTER IX.)

DISTRESS WARRANT.

To , my bailiff, Greeting.

Distrain the goods and chattels of the tenant in the house he now dwells in or upon the premises in h possession situated for the sum of being the amount of rent due to me on the same, on the day of 18 , and for your so doing this shall be your sufficient warrant and authority.

Dated the day of A.D. 18 .

UNDERTAKING TO DELIVER GOODS.

We, the undersigned, acknowledge to have received from bailiff, the following property, seized under and by virtue of a for against the goods and chattels of at the instance of which said property we undertake to deliver to him, the said bailiff, whenever demanded, in as good a condition as they now are.

Witness our hands the day of 18 .

Witness:

APPRAISEMENT.

Memorandum, that on the day of , A.D. 18 , of sworn appraisers, were sworn upon the Holy Evangelists by me of well and truly to appraise the goods and chattels mentioned in the inventory, according to the best of your judgment.

Present at the swearing of the said as above, and witness thereto.

Constable.

I, the above named being sworn upon the Holy Evangelists, by the constable above named, well and truly to appraise the goods and chattels mentioned in this inventory, according to the best of my judgment, and having viewed the said goods and chattels, do appraise the same at the sum of

As witness my hand the day of 18 .

APPRAISEMENT.

(*Another Form.*)

We, the above named and being duly sworn on the Holy Evangelists by constable,

above named, well and truly to appraise the goods and chattels mentioned in this inventory according to the best of our ability, and having viewed the said goods and chattels, do appraise and value the same at the sum of

As witness our hands this day of 18 .

TENANT'S CONSENT TO LANDLORD CONTINUING IN POSSESSION.

To A. B.

I desire you to keep possession of the goods and chattels which on the day of A.D. 18 , you distrained for rent due from me to you in the places where they are now lying for the space of days from the date hereof, on your undertaking to delay the sale for that time to enable me to defray the rent and charges, and I will pay the man for keeping possession.

Dated the day of A.D. 18 .

OATH TO BE ADMINISTERED TO APPRAISERS BY CONSTABLE.

You and each of you shall well and truly appraise the goods and chattels mentioned in this inventory, according to the best of your judgment, So help you God.

MEMORANDUM TO BE INDORSED ON THE INVENTORY.

Memorandum: That on the day of A.D. 18 , of , and of the goods and chattels mentioned in this inventory, were sworn on the Holy Evangelists by me, of constable, truly to appraise according to the best of their judgment. As witness my hand.

Present at the swearing of the said as above, and witness thereto.

Constable.

INVENTORY.

An inventory of the several goods and chattels distrained by me the day of , A.D. 18 , in the house, outhouses and lands of situate by authority and on behalf of your landlord, for the sum of being rent due to the said on the day of 18 .

In the dwelling-house:

On the premises:

Mr. Take notice, that as the bailiff to your landlord, I have this day distrained on the premises above mentioned the several goods and chattels specified in the above inventory, for the sum of being rent due to the said the day of 18 for the said premises; and that unless you pay the said rent, with the charges of distraining for the same, or replevy within five days from the date hereof, the

said goods and chattels will be appraised and sold according to law.

Given under my hand, the day of A.D. 18 .

Witness:

BAILIFF'S SALE.

Notice is hereby given, that the cattle, goods and chattels, distrained for rent on the day of 18 , by me as bailiff to the landlord of the premises of the tenant, will be sold by public auction, on the day of 18 , at o'clock, which cattle, goods and chattels are as follows, that is to say:

(Toronto), day of 18 .

NOTICES.

NOTICE TO QUIT FROM LANDLORD TO YEARLY TENANT.

Mr. A. B.,

I hereby give you notice to quit and deliver up the messuage and premises which you now hold of me, situate No. street, in the of on the day of next.

Dated the day of 18 .

Yours, etc.,

C. D.

BY AGENT OF THE LANDLORD.

Mr. A. B.,

I do hereby, as the agent for and on behalf of your landlord, Mr. of give you notice to quit and deliver up possession of the premises, situate at, etc., which you now occupy as his tenant, on the day of next.

Dated the day of , 18 .

Yours, etc.,

C. D.

NOTICE BY LANDLORD WHERE THE DATE OF COMMENCEMENT OF TENANCY IS UNCERTAIN.

Mr. A. B.,

I hereby give you notice to quit and deliver up the house and premises which you now hold of me, situate, etc., on the day of next, provided that your tenancy originally commenced on that day of the year and month, or if otherwise, then that you quit and deliver up possession of the premises at the end of the year of your tenancy which shall expire next after the end of one half-year from the time of your being served with this notice.

Dated the day of , 18 .

Yours, etc.,

C. D.

[If the tenancy is determinable at a quarter's notice, then say "quarter" instead of "half-year."]

NOTICE BY TENANT TO DETERMINE A LEASE.

The following is a notice by the lessee; but the form can easily be adapted to the case of a notice by the lessor.

Mr. A. B.

Sir,—I hereby give you notice that on the day of next, the first seven years of the term of twenty-one years (determinable at the end of seven or fourteen years) in the dwelling house and premises situate, etc., demised by you to me by indenture of lease, dated the day of , 18 will expire; and on that day I shall, in virtue of the option and power reserved to me by the said indenture, determine the said term, and quit and deliver up to you the possession of the said messuage and premises, and surrender to you all the residue of my interest in the said term so created as aforesaid.

Dated, etc. Yours truly, C. D.

NOTICE TO BE AFFIXED ON DESERTED PREMISES.

(Under stat. 11 Geo. II. c. 19, s. 16).

A. B.,

Take notice, that on the complaint of C. D., of etc. [insert landlord's residence], made unto us, E. F. and G. H., two of Her Majesty's justices of the peace for the said that you, the said A. B., have deserted the messuage and premises, situated at [insert where premises are] unto you demised at rack-rent by the said C. D., and that there is in arrear and due from you, the said A. B., unto the said C. D., one-half year's rent for the said demised premises, and that you have left the said premises unoccupied and vacant, so that no sufficient distress can be had to countervail the said arrears of rent, we, the said justices (neither of us having any in-

terest in the said demised premises), on the said complaint as aforesaid, and at the request of the said C. D., have this day come upon and viewed the said demised premises and do find the said complaint to be true; and on the day of this present month of we will return to take a second view thereof; and if, upon such second view, you, or some other person on your behalf, shall not appear and pay the said rent in arrear, or there shall not be sufficient distress on the said premises, that we, the said justices, will put the said C. D. into possession of the said demised premises, according to the form of the statute in such case made and provided. In witness whereof we have put our hands and seals, and have caused this notice to be affixed on the outer door of the dwelling house, the same being the most notorious part of the said premises.

Dated, etc. (Signed) E. F. (seal.)
G. H. (seal.)

NOTICE BY TENANT TO LANDLORD.

Sir,

I hereby give you notice that on the day of next, I shall quit and deliver up possession of the house and premises which I now hold of you, situate at, etc.

Dated this day of , 18 .

Yours, etc.,

To Mr. A. B. C. D.

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H. (seal.)

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